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THE

TREATY POWER

UNDER THE

CONSTITUTION OF THE UNITED STATES.

COMMENTARIES

ON THE

TREATY CLAUSES OF THE CONSTITUTION; CONSTRUCTION OF TREATIES; EXTENT OF TREATY-MAKING POWER; CONFLICT BETWEEN TREATIES AND ACTS OF CONGRESS, STATE CONSTITUTIONS AND STATUTES; INTERNATIONAL EXTRADITION; ACQUISITION OF TERRITORY; AMBASSADORS, CONSULS AND FOREIGN JUDGMENTS; NATURALIZATION AND EXPATRIATION; RESPONSIBILITY OF GOVERNMENT FOR MOB VIOLENCE, AND CLAIMS AGAINST GOVERNMENTS.

WITH APPENDICES CONTAINING

REGULATIONS OF DEPARTMENT OF STATE RELATIVE TO EXTRADITION OF FUGITIVES FROM JUSTICE, A LIST OF THE TREATIES IN FORCE, WITH THE INTERNATIONAL CONVENTIONS AND ACTS TO WHICH THE UNITED STATES IS A PARTY, AND A CHRONOLOGICAL LIST OF TREATIES.

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BY

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SAN FRANCISCO:

BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS.

1908.

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PREFACE.

The two most important powers possessed by the national government under the Constitution of the United States are the power to declare war and the power to make treaties—powers which, for brevity and convenience, we may designate as the war power and the treaty power. By the Declaration of Independence, the American colonies became free and independent states, capable of entering into treaties and of making alliances with foreign nations.

Under the Articles of Confederation the right of sending and receiving ambassadors and of entering into treaties with other nations was conferred upon the Continental Congress. Treaties made under such authority had, however, no binding force upon the separate states, many of which passed laws completely nullifying their provisions. There was an entire absence of judicial power under the Articles of Confederation to enforce the obligations of a treaty, and Congress was unable to assure the other contracting party that its part of the bargain could be performed. The various states, in their sovereign capacity, might act as they willed, and there was no authority in the national government, then existing, to compel the fulfillment of national compacts.

These, and other causes, led to the adoption of the present Constitution of the United States, which declares that treaties made under its authority shall be the supreme law of the land, and that the judicial power of the federal government shall extend to all cases in law and equity arising under such treaties. The Constitution contains other clauses, prohibiting the states from entering into treaties and placing the exercise of the treaty power in the hands of the President in co-operation with the Senate. Recent events have made the questions arising from the exercise of this power of great interest, and it has been my fortune to investigate, in an official capacity, on behalf of the United States, many of the questions considered in this volume.

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The treaty clauses of the Constitution are of sufficient importance to demand more consideration than is generally accorded to them in works on constitutional and international law, and it was my original intention to consider only the questions arising under them, but as the work progressed, it broadened in its scope so that now it treats of many questions of a cognate nature to which these clauses give rise.

While no two lawyers will, perhaps, agree that one particular branch of a question is more important than another—in a sense they are all equally important—yet I have treated some subjects at length and others more concisely. The constitutional prohibitions on the states to enter into treaties, the making, taking effect and termination of treaties, and the federal questions arising under treaties, are treated, it is believed, with sufficient completeness. Specially, have I devoted attention to the construction of treaties, the extent of the treaty-making power, and the conflict between treaties and acts of Congress, state constitutions and statutes. The law relative to international extradition dependent on treaty, the rights and duties of consuls, the acquisition of territory by treaty, together with naturalization and expatriation, has been also rather fully considered, while the chapters on the responsibility of the government for mob violence and claims against governments—covering only a part of the ground, it is true—may possess an interest from another than a purely legal standpoint.

It has been my aim to give the law as stated by the courts, but I have not hesitated, when I deemed it proper, to express my own views, placing them, however, in separate sections. It may not be inappropriate to add that I believe that the United States is a sovereign nation, fully capable, where not restrained by the limitations of the Constitution, of exercising all the powers that attach to sovereignty, and consequently that the treaty power should be construed in a broad and liberal spirit, and held to extend to all those subjects that are ordinarily disposed of by international negotiation.

ROBERT T. DEVLIN.

San Francisco, May 1, 1908.

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TREATY POWER OF THE CONSTITUTION.

CHAPTER I.

TREATY CLAUSES OF THE CONSTITUTION.

§ 1. Treaty clauses of the Constitution.
§ 2. Definitions.
§ 3. The continental Congress.
§ 4. Committee to prepare plan of treaties.
§ 5. Declaration of Independence.
§ 6. Treaties under Articles of Confederation.
§ 7. Weakness of the confederation.
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§ 9. Congress unable to guarantee observance of treaty obligations.
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§ 12. Treaty of peace with Great Britain.
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§ 14. Breaches of this treaty.
§ 15. Constitution removed this defect.
§ 16. Comments of James Madison.
§ 17. Comments of Samuel Adams.
§ 18. Formation of Constitution.
§ 19. Organization of constitutional convention.
§ 20. Address to Congress.
§ 21. Comments of John Jay.

§ 1. **Treaty clauses of the Constitution.**—The treaty clauses of the Constitution of the United States are:

1. States prohibited from making treaties:

(*a*) *"No State shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."*[a]

[a] Article I, section 10, clause 1.

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(*b*) *"No State shall, without the Consent of Congress, la any Duty of Tonnage, Keep Troops, or Ships of War in Tim of Peace, enter into any Agreement or Compact with anothe State, or with a Foreign Power, or engage in War, unles actually invaded, or in such imminent Danger as will not admi of delay."* [b]

2. Power to make treaties:

"He [the President] shall have Power, by and with th Advice and Consent of the Senate, to make Treaties, provide two-thirds of the Senators present concur; and he shall nom inate, and by and with the Advice and Consent of the Senate shall appoint Ambassadors, other public Ministers and Consuls Judges of the Supreme Court, and all other Officers of th United States, whose Appointments are not herein otherwis provided for, and which shall be established by law; but th Congress may by Law vest the Appointment of such inferio Officers, as they think proper, in the President alone, in th Courts of Law, or in the Heads of Departments." [c]

3. The judicial power extends to treaties:

"The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under thei Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and mari time Jurisdiction;—to Controversies to which the United State shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." [d]

4. Treaties the supreme law of the land:

"This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or

b Article I, section 10, clause 3.
c Article II, section 2, clause 2.
d Article III, section 2, clause 2.

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which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [e]

§ 2. **Definitions.**—Among the various definitions given of treaties we select the following:

"A treaty as understood in the law of nations . . . . is an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties." [1]

"When we speak of 'a treaty,' we mean an instrument written and executed with formalities customary among nations." [2]

"No nation treats with a citizen of another nation except through his government. The treaty, when made, represents a compact between the governments, and each government holds the other responsible for everything done by their respective citizens under it." [3]

"What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government." [4]

"Laws are always seen, and through that medium people know what they have to do. Treaties are not always seen. Some articles (being what are called secret articles) the public never see." [5]

"I consider a treaty . . . . as a solemn promise by the whole nation, that such and such things shall be done, or that such and such rights shall be enjoyed." [6]

"A treaty is in its nature a contract between two or more nations, and is so considered by writers on public law; and by the Constitution it is placed on the same footing and made of like

[e] Article VI, clause 2.

[1] Thompson, J., dissenting. Cherokee Nation v. Georgia, 5 Pet. 60, 8 L. ed. 25.

[2] Taney, C. J., Holmes v. Jennison, 14 Pet. 571, 10 L. ed. 579.

[3] Waite, C. J., Frelinghuysen v. Key, 110 U. S. 71, 3 Sup. Ct. Rep. 462, 28 L. ed. 71.

[4] McLean, J., Worcester v. Georgia, 6 Pet. 581, 8 L. ed. 483.

[5] Iredell, J., Ware v. Hylton, 3 Dall. 272, 1 L. ed. 568.

[6] Iredell, J., Ware v. Hylton, 3 Dall. 271, 1 L. ed. 568.

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obligation as a law of the United States. Both are declared in that instrument to be the supreme law of the land, and no paramount authority is given to either over the other."[7]

"Under the Constitution, a treaty between the United States and a foreign nation is to be considered in two aspects—as a compact between the two nations, and as a law of our country. As a compact, it depends for its enforcement on the good faith of the contracting parties, and to carry into effect some of its provisions may require legislation. For any infraction of its stipulations importing a contract, the courts can afford no redress except as provided by such legislation. The matter is one to be settled by negotiation between the executive departments of the two governments, each government being at liberty to take such measures for redress as it may deem advisable."[8]

"A treaty of cession is a deed of the ceded territory, the sovereign is the grantor, the act is his, so far as it relates to the cession, the treaty is his act and deed, and all courts must so consider it, and deeds are construed in equity by the rules of law."[9]

§ 3. **The continental Congress.**—As it became evident that if the colonies were to be successful in their contentions against Great Britain harmonious co-operation was necessary, the various colonies, acting upon the recommendation of Massachusetts that a continental Congress be called to consider the state of public affairs, appointed delegates, who assembled at Philadelphia on September 4, 1774. They determined that each colony or province should have one vote, adopted addresses to the people of England and to the adjoining British colonies, passed resolutions declaring that the importation of certain goods ought to cease after September 10, 1775, unless before that time the grievances of America should be removed, and proposed that a general Congress be held in May of the following year.

At the second Congress all the states were represented. The raising of continental troops was authorized, and George Washington was appointed commander-in-chief. They provided for

[7] Field, J., dissenting. Chew Heong v. United States, 112 U. S. 562, 5 Sup. Ct. Rep. 255, 28 L. ed. 770.

[8] Field, J., dissenting. Baldwin v. Franks, 120 U. S. 702, 7 Sup. Ct. Rep. 656, 30 L. ed. 766.

[9] Baldwin, J. United States v. Arredondo, 6 Pet. 738, 8 L. ed. 547.

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the issue of two millions of dollars in bills of credit, and pledged the colonies to redeem them, and on June 10th of that year a committee was constituted to prepare a declaration to the effect "that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain is, and ought to be dissolved."[10]

§ 4. **Committee to prepare plan of treaties.**—A committee was appointed on the following day, June 11th, to prepare a plan of treaties to be proposed to foreign powers. On the 4th of July the Declaration of Independence was adopted. The powers of a government were exercised by Congress until the adoption of the Articles of Confederation. A resolution was passed by Congress on June 11, 1776, providing for the appointment of a committee to prepare and digest the form of a confederation to be entered into between the colonies. This committee on July 12, 1776, presented a draft which was under debate for several days, and on August 20, 1776, the committee of the whole reported a new draft.[11]

On November 15, 1777, Congress finally adopted the articles, and the final ratification by all the states occurred March 1, 1781.[12]

§ 5. **Declaration of Independence.**—The Declaration of Independence on July 4, 1776, effected a severance of the political connection between the colonies and the English crown and constituted the colonies free and independent states. "The consequences flowing from its adoption were," says Mr. Curtis, "that the local allegiance of the inhabitants of each colony became transferred and due to the colony itself, or as it was expressed by the Congress, became due to the laws of the colony from which they derived protection; that the people of the country became thenceforth the rightful sovereign of the country; that they became united in a national capacity, as one people; that they could thereafter enter into treaties and contract al-

[10] Journals of Congress of 1776, 205, 206.

[11] Journals of 1776, 304.

[12] Secret Journals, 401, 418, 423, 426; 3 Kent's Commentaries, 196, 197.

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liances with foreign nations, could levy war and conclude peace, and do all other acts pertaining to the exercise of a national sovereignty; and finally, that in their national capacity, they became known and designated as the United States of America. This Declaration was the first national state paper in which these words were used as the style and title of the nation."[13]

"A nation and a state did not spring into existence, through that declaration, as dramatic publicists are wont to express it. Nations and states do not spring into existence. The significance of the proclamation was this: a people testified thereby the consciousness of the fact that they had become, in the progressive development of history, one whole, separate, and adult nation, and a national state, and that they were determined to defend this natural status against the now no longer natural supremacy of the foreign state."[14]

§ 6. **Treaties under Articles of Confederation.**—It was declared in the first article that the name of the confederacy should be "The United States of America," and in the second that each state should retain its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which was not expressly delegated by the confederation to the United States. The sole and exclusive right was conferred upon Congress of sending and receiving ambassadors, and of entering into treaties and alliances under the restriction that no treaty of commerce could be made by which the legislative power of the states was to be restrained from imposing such imposts and duties on foreigners as their own people were subjected to, or prohibiting the exportation or importation of any species of goods or commodities. No state was allowed, without the consent of the United States, to send an embassy to, or receive an embassy from, or make any treaty with any ruler or state; nor without the consent of Congress could any state enter into any treaty, confederation or alliance with each other. But the Articles of Confederation contained no means to carry its powers into execution. It might declare everything, but do nothing; or, in the words of Washington, the confederation was "little

[13] 1 Curtis' Constitutional History of the United States, 35.

[14] 1 Burgess' Political Science and Constitutional Law, 100.

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more than a shadow without the substance; and Congress a nugatory body, their ordinances being little attended to."[15]

[15] 5 Marshall's Life of Washington, 64.

The clauses of the Articles of Confederation relating to these subjects were:

"Article VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince or state; nor shall any person holding any office or profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

"No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

"No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

"No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

"No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and upon such regulations as shall be established by the United States in Congress assembled, unless such State shall be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled, shall determine otherwise."

"Article IX. The United States in Congress assembled, shall have the sole and exclusive right and power of de-

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§ 7. **Weakness of the confederation.**—"The government of the United States could not go on under the confederation," said Mr. Justice Patterson, "because Congress were obliged to proceed in the line of requisition. Congress could not under the old confederation raise money by taxes, be the public exigencies ever so pressing and great. They had no coercive authority—if they had, it must have been exercised against the delinquent states, which would be ineffectual, or terminate in a separation. Requisitions were a dead letter, unless the state legislatures could be brought into action; and when they were, the sums raised were very disproportional. Unequal contributions or payments engendered discontent, and fomented state jealousy." [16]

As each state pursued its own course, treaty obligations entered into by the general government had no binding force, and in many of the states laws were passed which rendered nugatory the stipulations in treaties with other governments, and this evil became so great that in April, 1787, Congress was compelled to address to the several states a letter, beseeching them to repeal such of their laws as interfered with the treaties made with foreign nations.[17]

We shall notice the breaches of the treaty of peace with Great Britain at greater length in a subsequent section.

§ 8. **Treaties under continental Congress.**—On February 16, 1776, it was suggested that treaties with foreign powers should be

termining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in time of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of said courts."

[16] Hylton v. United States, 3 Dall. 172, 178, 1 L. ed. 556.

[17] 1 Amer. Museum, 352.

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made to open our ports to foreign commerce, but to this proposition the answer was returned that the character in which Congress should act should first be determined—whether as the representatives of independent states or as dependencies of Great Britain. A committee on secret correspondence was appointed by Congress on the 29th of November, 1775. It was the duty of this committee to correspond with the friends of the colonies wherever they might be found to be throughout the world. Instructions addressed to Silas Deane were signed by Dr. Franklin, Benjamin Harrison, John Dickinson, Robert Morris and John Jay on the third day of March, 1776, directing him to enter into communication with M. de Vergennes, and to learn, if possible, whether France would enter into any treaty or alliance with them for commerce or defense, or both, should the colonies form themselves into independent states. On the 17th of September, 1775, a plan of treaty was adopted to be proposed to the King of France. The commissioners selected by the continental Congress to conclude treaties with the nations of the world were Dr. Franklin, Silas Deane and Arthur Lee, the latter having been elected in the place of Thomas Jefferson, who declined. The commissioners on January 6, 1778, concluded a treaty of alliance and a treaty of amity and commerce with the King of France, and following this, treaties were made with several other powers, the treaty of peace with Great Britain being made in 1783.[18]

[18] Notes, Treaty Volume 1776-1887, 1219, J. C. B. Davis; Bancroft's History of the United States, Vol. IV, p. 335; Moore's American Diplomacy, 33. The first diplomatic representatives commissioned to represent the United States were Benjamin Franklin, Silas Deane and Arthur Lee. Jefferson was appointed first, but being forced to decline, Lee was appointed in his stead. Their letters of credence was: "The Delegates of the United States of New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to all who shall see these presents; send greeting;—Whereas, a trade, upon equal terms, between the subjects of his most Christian Majesty, the King of France, and the people of these States, will be beneficial to both nations;—Know ye, therefore, that we, confiding in the prudence and integrity of Benjamin Franklin, one of the Delegates in Congress from the State of Pennsylvania, and President of the Convention of said State, etc., Silas Deane, now in France, late a Delegate from the State of Connecticut, and Arthur Lee, barrister at law, have appointed and deputed, and by these presents do appoint and depute

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§ 9. **Congress unable to guarantee observance of treaty obligations.**—Congress, under the Articles of Confederation, was unable to guarantee that commercial regulations under treaty provisions would or could be faithfully observed, and there was, therefore, a want of reciprocity. Foreign nations were bound by their treaty compacts, while the federal government had no coercive power over the states. Again, to quote Washington: "America must appear in a very contemptible point of view to those with whom she was endeavoring to form commercial treaties, without possessing the means of carrying them into effect. They must see and feel that the Union, or the states individually, are sovereign as best suits their purposes. In a word, we are a nation to-day, and thirteen to-morrow. Who will treat with us on such terms?"[19]

It was not until the adoption of the Constitution that the treaty of peace of 1783 was faithfully executed in relation to British debts.[20]

§ 10. **Refusal of states to observe treaty.**—Several of the states had refused to carry out the terms of the treaty, and Great

them, the said Benjamin Franklin, Silas Deane, and Arthur Lee, our Commissioners, giving and granting to them, the said Franklin Deane, and Lee, or any two of them, and in the case of the death, absence or disability of any two, or any one of them, full power to communicate, treat, agree, and conclude with his most Christian Majesty, the King of France, or with such person or persons, as shall by him be for that purpose authorized, of and upon a true and sincere friendship, and a firm, inviolable and universal peace for the defense, protection and safety, of the navigation and mutual commerce of the subjects of his most Christian Majesty, and the people of the United States, and to do all other things, which may conduce to those desirable ends, and promising in good faith to ratify whatsoever our said Commissioners shall transact in the premises. Done in Congress, in Philadelphia, the thirtieth day of September, in the year of our Lord, one thousand seven hundred and seventy-six": 2 Secret Journals of Congress, 32.

They reported to Congress: "It was evident that the court [of France], while it treated us privately with all civility, was cautious of giving umbrage to England, and was, therefore, desirous of avoiding open reception and acknowledgment of us, or entering into any formal negotiations with us, as ministers from the Congress": 2 Dip. Cor. Rev. 283.

[19] 5 Marshall's Life of Washington, 71, 72; North American Review, Oct. 1827, p. 257.

[20] Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568; Hopkins v. Bell, 3 Cranch, 454, 2 L. ed. 497.

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Britain demanded redress for these infractions, and had refused in consequence to comply with the stipulations of the treaty requiring her to surrender up the western ports. Through the inability of the confederacy to enforce treaty stipulations the country was in danger of attacks by Indians on our western limits, and the address, drawn up in 1787, by Mr. Jay, Secretary of Foreign Affairs, and unanimously adopted by Congress, displays the absolute weakness of the confederation and also the contemptuous disregard of the provisions of that treaty by the various states in their legislation.[21]

As showing the jealousy entertained by the states of the powers of the general government, it may be observed that when the British garrison was expected to surrender the western posts, and it was deemed necessary that possession of them on behalf of America should be taken by some regular troops, the power of Congress to make a requisition in the states for this object was disputed, and it was asserted that the power was dangerous to liberty. Finally, the proposition was rejected, and in place of the regular troops militia were sent.[22]

§ 11. Want of judicial power to enforce treaties.—Among other defects that were urged against the confederation was the want of judicial power to enforce treaty obligations. "Laws are a dead letter," said the Federalist, "without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, so far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal. And this tribunal ought to be instituted under the same authority, which forms the treaties themselves. These ingredients are both indispensable. If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts, but the judges

[21] Journals of Congress, April 13, 1787, p. 32; Rawle on Constitution, App. 2, p. 316; 1 Story on Constitution, sec. 262.

[22] 5 Marshall's Life of Washington, App., note 1.

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of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one tribunal paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort an uniform rule of justice. This is the more necessary where the frame of the government is so compounded that the laws of the whole are in danger of being contravened by the laws of the parts. The treaties of the United States, under the present confederation, are liable to the infractions of thirteen different legislatures and as many different courts of final jurisdiction, acting under the authority of these legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions and the interests of every member, of which these are composed. Is it possible, under such circumstances, that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?" [23]

§ 12. **Treaty of peace with Great Britain.**—A provisional treaty of peace was made with Great Britain at Paris, November 30, 1782, and was proclaimed by Congress on April 11, 1783. The armistice declaring a cessation of hostilities was concluded January 20, 1783, and the definitive treaty of peace was concluded at Paris, September 3, 1783, ratified by Congress January 14, 1784, and proclaimed the same day. The first article of this treaty recognized the independence of the United States; the second fixed the boundaries; the third made provisions for the unmolested right to take fish on the Newfoundland banks and in the gulf of St. Lawrence. The fourth article was: "It is agreed that Creditors on either Side, shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide debts heretofore contracted." The fifth article declared: "It is agreed that the Congress shall earnestly recommend it to the Legislatures of the respective States to provide for the Restitution of all Estates, Rights and Properties which have been confiscated belonging to real British Subjects; and also for the Estates, Rights and Prop-

[23] The Federalist, No. 22; 1 Kent's Commentaries, Lecture 10.

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erties of Persons resident in Districts in the Possession of his Majesty's Arms, and who have not borne Arms against the said United States. And that Persons of any other Description shall have free Liberty to go to any Part or Parts of any of the thirteen United States and therein to remain twelve Months unmolested in their Endeavours to obtain the Restitution of such of their Estates, Rights & Properties as may have been confiscated. And that Congress shall also earnestly recommend to the several States, a Reconsideration and Revision of all Acts or Laws regarding the Premises, so as to render the said Laws or Acts perfectly consistent, not only with Justice and Equity, but with that Spirit of Conciliation, which, on the Return of the Blessings of Peace should universally prevail. And that Congress shall also earnestly recommend to the several States, that the Estates, Rights and Properties of such last mentioned Persons shall be restored to them, they refunding to any Persons who may be now in Possession, the bona fide Price (where any has been given) which such Persons may have paid on purchasing any of the said Lands, Rights or Properties, since the Confiscation.

"And it is agreed that all Persons who have any Interest in confiscated Lands, either by Debts, Marriage Settlements, or otherwise, shall meet with no lawful Impediment in the Prosecution of their just Rights."[24]

§ 13. **Same subject.**—The sixth article of the treaty declared: "That there shall be no future Confiscations made nor any Prosecutions commenc'd against any Person or Persons for or by Reason of the Part, which he or they may have taken in the present War, and that no Person shall on that Account suffer any future Loss or Damage, either in his Person, Liberty or Property; and that those who may be in Confinement on such Charges at the Time of the Ratification of the Treaty in America shall be immediately set at liberty, and the prosecutions so commenced be discontinued."

The seventh article stated: "There shall be a firm and perpetual Peace between his Britannic Majesty and the said States and

[24] Compilation of Treaties in Force, Government Printing Office, 1904, pp. 292-294.

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between the Subjects of the one, and the Citizens of the other, wherefore all Hostilities both by Sea and Land shall from henceforth cease: All Prisoners on both Sides shall be set at Liberty, and his Britannic Majesty shall with all convenient speed, and without causing any Destruction, or carrying away any Negroes or other Property of the American Inhabitants, withdraw all his Armies, Garrisons & Fleets from the said United States and from every Post, Place and Harbour within the same; leaving in all Fortifications the American Artillery that may be therein: And shall also order & cause all Archives, Records, Deeds & Papers belonging to any of the said States, or their Citizens, which in the Course of the War may have fallen into the Hands of his Officers, to be forthwith restored and deliver'd to the proper States and Persons to whom they belong."

In the eighth article it was provided that: "The Navigation of the River Mississippi, from its source to the Ocean shall forever remain free and open to the Subjects of Great Britain, and the Citizens of the United States."

And in the ninth article it was stipulated: "In Case it should so happen that any Place or Territory belonging to Great Britain or to the United States should have been conquer'd by the Arms of either from the other before the arrival of the said Provisional Articles in America it is agreed that the same shall be restored without difficulty and without requiring any compensation." [25]

§ 14. **Breaches of this treaty.**—There was no power under the confederation to compel the observance of this treaty, and its provisions were ignored by the states. In New York a statute was passed in 1783 by which actions for rent were authorized to be brought by persons who had been forced to abandon their lands by the enemy against those who were in their occupation while the enemy held possession, and which also forbade the pleading in justification of such occupation of any military order or command of the enemy.[26] Again, in 1784, after the ratification of the treaty, a statute was passed in the same state which declared that those inhabitants who had given their adhesion to the enemy, if found within the state, should be guilty of mis-

[25] Compilation of Treaties in Force, Government Printing Office, 1904, pp. 292, 296.

[26] 4 Secret Journals, 267.

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prision of treason, and that they should be incapable of holding office or of voting at elections.[27] Mr. Jay, Secretary of Foreign Affairs, made a report in October, 1786, calling attention to various acts of the states in conflict with the treaty, and mentioned among them the statute passed in 1784 by Massachusetts, which suspended judgment for interest on British debts until a construction should have been put upon the treaty by Congress declaring it to be due; the law of Pennsylvania in restraint of the levy of executions; the statute of New York of 1782, providing for the restraint of the collection of debts due to persons within the lines of the enemy; the statute of Virginia, prohibiting the collection of debts due to British creditors, and the statute of South Carolina, providing that they might be paid by land instead of money.[28] A case was brought in New York to recover the rents of property, under the statute above noted. The defense was conducted by Alexander Hamilton, who contended that the statute violated the treaty, and his contention was sustained by the court, but the legislature of that state declared that the decision was subversive of law and good order, and recommended that such persons should be appointed to office as would "govern themselves by the known law of the land."[29]

§ 15. **Constitution removed this defect.**—By the adoption of the Constitution, the inability of the United States to enforce treaty stipulations was removed. Speaking of the impossibility of securing concerted action among the several states prior to the adoption of the Constitution, Mr. Curtis states: "This combined will of distinct communities, expressed through the action of a common agent, was wholly unable to overcome the adverse will of any of them expressed by another and separate agent, although the objects of the powers bestowed on the confederacy were carefully stated, and sufficiently defined in a public compact.

"Thus, for example, the treaty-making power was expressly vested in the United States in Congress assembled; but when a treaty had been made, it depended entirely upon the separate pleasure of each state whether it should be executed. If the state governments did not see fit to enforce its provisions upon

[27] 4 Secret Journals, 269.
[28] 4 Secret Journals, 209.
[29] 2 Life of Hamilton, 244.

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their own citizens, or thought proper to act against them, there was no remedy, both because the Congress could not legislate to control individuals, and because there was no department clothed with authority to compel individuals to conform their conduct to the requirements of the treaty, and to disregard the opposing will of the state.

"This defect was now to be supplied, by giving to the national authority, not only theoretically but practically, a supremacy over the authority of each state. But this was not to be done by annihilating the state governments. The government of every state was to be preserved; and so far as its original powers were not to be transferred to the general government, its authority over its own citizens and within its own territory must, from the nature of political sovereignty, be supreme. There were, therefore, to be two supreme powers in the same country, operating upon the same individuals, and both possessed of the general attributes of sovereignty. In what way, and in what sense, could one of them be made paramount over the other?

"It is manifest that there cannot be two supreme powers in the same community, if both are to operate upon the same objects. But there is nothing in the nature of political sovereignty to prevent its powers from being distributed among different agents for different purposes. This is constantly seen under the same government, when its legislative, executive, and judicial powers are exercised through different officers; and in truth, when we come to the law-giving power alone, as soon as we separate its objects into different classes, it is obvious that there may be several enacting authorities, and yet each may be supreme over the particular subject committed to it by the fundamental arrangements of society. Supreme laws, emanating from separate authorities, may and do act on different objects without clashing, or they may act on different parts of the same object with perfect harmony. They are inconsistent when they are aimed at each other, or at the same indivisible object. When this takes place one or the other must yield; or, in other terms, one of them ceases to be supreme on the particular occasion. It was the purpose of the framers of the Constitution of the United States to provide a paramount rule that would determine the occasions on which the authority of a state should cease to be supreme, leaving that of the United States unobstructed. Certain conditions were

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made necessary to the operation of this rule. The state law must conflict with some provision of the Constitution of the United States, or with a law of the United States enacted in pursuance of the constitutional authority of the Union. The operation of this rule constitutes the supremacy of the national government. It was supposed that, by a careful enumeration of the objects to which the national authority was to extend, there would be no uncertainty as to the occasions on which the rule was to apply; and as all other objects were to remain exclusively subject to the authority of the states within their respective territorial limits, the operation of the rule was carefully limited to those occasions."[30]

§ 16. **Comments of James Madison.**—James Madison, urging the ratification of the Constitution in the state convention of Virginia, spoke of the weak powers possessed by the confederation and of the imperative necessity of making the treaty-making power effectual. "The confederation," said he, "is so notoriously feeble, that foreign nations are unwilling to form any treaties with us; they are apprized that our general government cannot perform any of its engagements, but they may be violated at pleasure by any of the states. Our violations of treaties already entered into proves this truth unequivocally. No nation will, therefore, make any stipulations with Congress, conceding any advantages of importance to us; they will be the more adverse to entering into engagements with us, as the imbecility of our government enables them to derive many advantages from our trade, without granting us any return. But were this country united by proper bands, in addition to other great advantages, we could form very beneficial treaties with foreign states. But this can never happen without a change in our system. Were we not laughed at by that minister of that nation, from which we may be able yet to extort some of the most salutary measures for this country? Were we not told that it was necessary to temporize till our government acquired consistency? Will any nation relinquish national advantages to us? You will be greatly disappointed, if you expect any such good effects from this contemptible system. Let us recollect our conduct to that country

[30] 1 Curtis' Constitutional History of the United States, 556, 557.

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from which we have received the most friendly aid. How have we dealt with that benevolent ally? Have we complied with our most sacred obligations to that nation? Have we paid the interest punctually from year to year? Is not the interest accumulating, while not a shilling is discharged of the principal? The magnanimity and forbearance of that ally are so great that she has not called upon us for her claims, even in her own distress and necessity."[31]

§ 17. **Comments of Samuel Adams.**—Samuel Adams, of Massachusetts, was at first opposed to the ratification of the Constitution, but finally gave it his approval. Speaking of the inability of the confederation to secure the observance of treaties, he said: "For want of this power in our national head, our friends are grieved, and our enemies insult us. Our ambassador at the court of London is considered as a mere cipher, instead of the representative of the United States. Therefore, it appears to me, that a power to remedy this evil should be given to Congress, and the remedy applied as soon as possible."[32]

§ 18. **Formation of Constitution.**—The legislature of Virginia in January, 1786, provided by a resolution for the appointment of commissioners, who were to meet with such others as should be appointed by the other states in the Union, at a time and place to be decided on, "to take into consideration the trade of the United States; to examine the relative situation and trade of the United States; to consider how far a uniform system in their commercial relations may be necessary, to their common interest, and their permanent harmony; and to report to the several states such an act, relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress assembled to provide for the same."[33] Commissioners from five states only met at Annapolis in September, 1876, but these agreed to take no decisive action, but drafted a report to be submitted to the several states and to Congress, in which they recommended the appointment of commissions from all the states to meet at Philadelphia on the second Monday in May of the following year to

[31] 3 Elliott's Debates, 135.
[32] 2 Elliott's Debates, 123.
[33] 5 Marshall's Life of Washington, 90, 91; 1 Kent's Commentaries, 203.

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consider the situation of the United States, and "to devise such further provisions as shall appear to them necessary, to render the Constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled, as when agreed to by them, and afterward confirmed by the legislature of every state, will effectually provide for the same."[34] While Virginia passed an act for the appointment of delegates, no progress was made until Congress, pursuant to a request from the legislature of New York, adopted on February 21, 1787, a resolution recommending that a convention meet in Philadelphia on the second Monday in May, 1788, "for the purpose of revising the articles of confederation, and reporting to Congress, and the several legislatures, such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the states, render the federal constitution adequate to the exigencies of the government, and the preservation of the Union."[35]

§ 19. **Organization of constitutional convention.**—It was not before May 25th that seven states were represented, and on that day the convention organized by unanimously electing George Washington president. A serious dispute arose over the method of representation, whether it should be by states or in proportion to population, which finally resulted in a compromise of the antagonistic interests by allowing proportional representation in one branch of Congress and representation by states in the other. On July 26th, the various resolutions to which assent had been given were submitted to a Committee of Detail, of five members, consisting of Rutledge, Randolph, Gorham, Ellsworth and Wilson, and an adjournment was taken to August 6th, to enable the committee to prepare the form of a constitution. The Committee on Detail reported to the convention, and after many acrimonious debates on the various propositions advanced, the convention finally, on September 8th, appointed a committee of five, consisting of Johnson, Hamilton, Gouverneur Morris, Madison and King, to make a revision of the language and arrangement of the articles

[34] 5 Marshall's Life of Washington, 97; 1 Amer. Museum, 267, 268.

[35] 5 Marshall's Life of Washington, 124, 125; 2 Pitk. Hist., 219, 220; 12 Journals of Congress, 12.

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adopted. This Committee on Style reported to the convention on September 12th of that year, after which a number of unimportant amendments were made, but among others, after this report had been submitted, the convention adopted an amendment authorizing one representative for every thousand people, and another that no state should, unless it consented, lose its equal representation in the Senate. Congress received the report of the convention on September 28, 1787, and unanimously adopted a resolution declaring "that the said report, with the resolutions and letter accompanying the same, be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof; in conformity to the resolves of the convention, made and provided in that case."[36]

§ 20. **Address to Congress.**—The letter referred to in the resolution quoted above, addressed to Congress, stated that it was impracticable to provide for the interest and safety of all the states, and at the same time to secure all the rights of independent sovereignty to each. "Individuals entering into society," said the address, "must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance as on the object to be attained. It is at all times difficult to draw with precision the line between these rights and those which may be reserved; and on the present occasion, the difficulty was increased, by a difference among the several states, as to their situation, extent, habits, and particular interests. In all our deliberations on the subject, we kept steadily in our view that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each state in the convention to be less rigid on points of inferior magnitude than might have been otherwise expected. And thus the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession, which the peculiarity of our political situa-

[36] 5 Marshall's Life of Washington, 128; 12 Journal of Congress, 99, 110. See, also, Spark's Gouverneur Morris, III, 323; Elliott, V, 191; Conway's Randolph, p. 71.

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tion rendered indispensable."[37] The Constitution having been ratified by the requisite number of states, a resolution was passed by Congress on September 13, 1788, fixing the first Wednesday in January, 1789, for the assembling of electors to choose a President, and designating the first Wednesday in March of that year for the inauguration of the government under the Constitution.

§ 21. Comments of John Jay.—With reference to the clause of the Constitution relating to the negotiation and ratification of treaties, he said: "Some are displeased with the Constitution, not on account of any errors or defects in it, but because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern, as the laws passed by our legislature. All constitutional acts of power, whether in the executive or the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; and therefore, whatever name may be given to the power of making treaties, or however obligatory they may be when made, certain it is, that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judiciary. It surely does not follow that because they have given the power of making laws to the legislature, that therefore they should likewise give them power to do every other act of sovereignty by which the citizens are to be bound and affected. Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country; but new errors as well as new truths often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us which would be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it. They who make laws may,

[37] 12 Journal of Congress, 99, 110; 5 Marshall's Life of Washington, 128.

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without doubt, amend or repeal them, and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not only by one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterward be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding and just as far beyond the lawful reach of legislative acts now as they will be at any future period or under any form of government."[38] But, as we shall see on a subsequent page, Jay was mistaken as to the immutability of treaties, because it is settled that a treaty may be repealed or rendered inoperative by a later act of Congress.

[38] 1 Lodge, Federalist, 403, 404.

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CHAPTER II.

PROHIBITION ON STATES.

§ 22. Prohibitory clauses.
§ 23. History of this clause.
§ 24. Confederate states had no legal existence.
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§ 27. Investment by guardian in Confederate bonds.
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§ 29. Confederacy an organized treason.
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§ 31. Ordinance of secession a nullity.
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§ 22. Prohibitory clauses.—The Constitution contains two clauses prohibiting the states of the Union from entering into treaties with foreign powers or entering into any agreement or compact with another state or with a foreign power.

The first clause provides that "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."[1] The other clause will be noticed in the following chapter.

§ 23. History of this clause.—This provision originated in the Committee on Detail, who reported among other prohibitions to be placed on the states that "No state shall coin money, nor grant letters of marque and reprisal, nor enter into any treaty, alliance or confederation, nor grant any title of nobility." The clause was amended by the convention by prohibiting the emission of bills of credit, or the making of anything but gold and silver

[1] Const., art. I, sec. 10, cl. 1.

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coin a tender in payment of debts. The clause as amended by the convention then read: "No state shall coin money, nor emit bills of credit, nor make anything but gold and silver coin a tender in payment of debts; nor grant letters of marque and reprisal; nor enter into any treaty, alliance, or confederation; nor grant any title of nobility." Finally, on September 14th, after the report of the Committee on Style, to whom the clause had been referred, submitted their report, the phraseology was changed to the form in which it now appears.

§ 24. **Confederate states had no legal existence.**—The organization known as the Confederate states cannot be regarded under this clause of the Constitution as having any legal existence. The Confederate states enacted a law sequestering the property and rights held by or for any alien enemy since May 21, 1861, except such debts as may have been paid into the treasury of one of the Confederate states before the passage of the law, and making it the duty of every agent or trustee holding or controlling any such interest or property to inform the receiver of the Confederate states of the fact, and to render an account thereof, and to place the same in the hands of the receiver, so far as practicable. The statute declared that the person placing the property in the hands of such receiver should be acquitted of all responsibility for the property thus transferred, and that any person failing to give the information described should be guilty of a misdemeanor. In an action of *assumpsit* for goods sold, a plea was interposed of this statute, and payment thereunder of the amount claimed by plaintiff to the receiver of the Confederate states. It was contended that the supreme court had no appellate jurisdiction, but the court held that the jurisdiction of the court could be sustained, among other grounds, upon the fact that the compact made by the states forming the confederacy was in violation of the clause prohibiting any treaty, alliance or confederation by one state with another. As the confederacy could not legally exist, whatever legal force the enactment possessed was due solely to the sanction given to it by the individual state. Any enactment, from whatever source it might originate, to which a state gives the force of law, was considered to be a statute of the state within the meaning of the provisions conferring appellate jurisdiction upon the supreme court. "It would be a narrow construc-

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tion," said Mr. Justice Field, delivering the opinion of the court, "to limit the term to such enactments as have gone through various stages of consideration by the legislature. There may be many acts authorized by the Constitution of a state, or by the convention that framed it, which have not been submitted to the consideration of its legislature, yet have all the efficacy of laws. By the only authority which can be recognized as having any legal existence, that is the state of Virginia, this act of the unauthorized confederation was enforced as a law of the commonwealth."[2]

§ 25. Constitutional objections to statute.—It was asserted that this statute was repugnant to the Constitution of the United States because it impaired the obligation of a contract, and that it discriminated against the citizens of a loyal state and refused them the same privileges accorded to the citizens of Virginia violating the provision declaring that "citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." It was also contended that the enactment of the Confederate states was that of an independent nation, but the court decided that it could not be treated either as the act of an independent nation or of a *de facto* government, but must be considered as the act of a portion of a state attempting unsuccessfully to establish a separate revolutionary government, which, with the overthrow of its military forces, perished completely with all its enactments. While belligerent rights may have been conceded to the Confederate states, this concession conferred no other rights, approved no hostile legislation, and impaired in no degree the rights of loyal citizens as they had existed when hostilities commenced.[3] The Constitution was as much intended to preserve the government of the separate states as it was to preserve the government of the Union itself, and, hence, the rights and ob-

[2] Williams v. Bruffy, 96 U. S. 183, 24 L. ed. 716.

[3] Williams v. Bruffy, 96 U. S. 183, 24 L. ed. 716.

Mr. Chief Justice Chase, in Texas v. White, 7 Wall. 700, 19 L. ed. 227, said: "The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these Articles were found to be inadequate to the exigencies of

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ligations of the citizens of the seceding states could not be altered or affected by any ordinance of secession.

the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perfect Union, made more perfect, is not?

"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' Lane Co. v. Oregon (infra, 101). Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

"When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The Act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The Union between Texas and the other States was as complete, as perpetual and as indissoluble as the Union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

"Considered, therefore, as the transactions under the Constitution, the Ordinance of Secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the Acts of her Legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired. It certainly followed that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, must have become a war for conquest and subjugation.

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§ 26. **Surrender of treaty power to general government.**—By this clause and the clause conferring upon the President, with the advice and consent of the Senate, the power to make treaties, the treaty-making power has been surrendered by the states to the general government. "There can be no mistaking the significance or effect of these plain, concise, emphatic provisions."[4] Under our system of government, the Constitution, laws and treaties of the United States are a part of the law of every state to the same extent as are its own Constitution and laws, for if the national government is not empowered to stipulate by treaty as to the rights, privileges and immunities of foreigners residing in the United States, the power does not exist at all, because it is denied to the states.

"Our conclusion, therefore, is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National Government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the Rebellion.

"But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State Government, competent to represent the State in its relations with the National Government, so far at least as the institution and prosecution of a suit is concerned.

"And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remain unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought.

"And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, Senators chosen by her Legislature, or Representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit, that during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion."

[4] In re Tiburcio Parrott, 1 Fed. 501, 6 Saw. 349, per Sawyer, J.

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§ 27. **Investment by guardian in Confederate bonds.**—It was unlawful for a guardian to invest money of his ward during the war of the Rebellion, while both he and the ward were residing in the territory of the enemy, in bonds of the so-called Confederate states. The guardian is responsible to the ward for all the money so invested by him.[5]

"The so-called Confederate government was in no sense a lawful government, but was a mere government of force, having its origin and foundation in rebellion against the United States The notes and bonds issued in its name and for its support had no legal value as money or property, except by agreement or acceptance of parties capable of contracting with each other, and can never be regarded by a court sitting under the authority of the United States as securities in which trust funds might be lawfully invested."[6]

§ 28. **Discharge of executor investing in Confederate bonds.**—An executor cannot be discharged from liability to the legatees, because, in pursuance of the terms of a state statute and with the approval of the probate court appointing him he had invested the funds of the estate in bonds of the Confederate states, which, while he held them, became worthless.[7]

§ 29. **Confederacy an organized treason.**—While the acts of the states in rebellion in the ordinary course of administration of law should, in the interests of civil society, be upheld, still the government of the confederacy had no existence excepting as an organized treason. During its continuance, its purpose was to subvert the lawful government, and its laws and decrees. No validity can be derived from its authority, for any act performed in its service or in aid of its purpose. Hence a person purchasing cotton from the Confederate states, knowing that the money paid by him went to sustain the Rebellion, cannot recover the proceeds in the court of claims, when it has been captured and sold under the Captured and Abandoned Property Act. In a court of law, the moral turpitude of the transaction is such that

[5] Lamar v. Micou, 112 U. S. 453, 5 Sup. Ct. Rep. 221, 28 L. ed. 751.

[6] Mr. Justice Gray, in Lamar v. Micou, 112 U. S. 453, 5 Sup. Ct. Rep. 221, 28 L. ed. 751.

[7] Horn v. Lockhart, 84 U. S. (17 Wall.) 570, 21 L. ed. 657.

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he should not be allowed to establish his title by proving such a transaction.[8]

Mr. Justice Miller, who delivered the opinion of the court, in the case just cited, said that the fact that the claimant did not intend to aid the Rebellion, but only to make money, did not relieve the case of its harsh features, and speaking of the government of the Confederate states said: "So far from being necessary to the organization of civil government, or to its maintenance and support, it was inimical to social order, destructive to the best interests of society, and its primary object was to overthrow the Government on which these so largely depended. Its existence and temporary powers were an enormous evil, which the whole force of the Government and the people of the United States was engaged for years in destroying. When it was overthrown it perished totally. It left no laws, no statutes, no decrees, no authority which can give support to any contract, or any act done in its service, or in aid of its purpose, or which contributed to protract its existence. So far as the actual exercise of its physical power was brought to bear upon individuals, that may, under some circumstances, constitute a justification or excuse for acts otherwise indefensible; but no validity can be given in the courts of this country to acts voluntarily performed in direct aid and support of its unlawful purpose. What of good or evil has flowed from it remains for the consideration and discussion of the philosophical statesman and historian."[9]

[8] Sprott v. United States, 87 U. S. (20 Wall.) 459, 22 L. ed. 371.

[9] Sprott v. United States, *supra*. Justices Clifford and Davis concurred in the judgment. Mr. Justice Field dissented, and said there was no question of enforcing a contract in the case, and that the only question was whether the cotton, at the time of seizure, was the property of the claimant. "If it was his property," said he, "then he is entitled to its proceeds, and the judgment of the Court of Claims should be reversed; and in determining this question we are not concerned with the consideration of his loyalty or disloyalty. He was a citizen of Mississippi, and resided within the lines of the Confederacy, and the Act forbidding intercourse with the enemy does not apply to his case. He was subject to be treated, in common with other citizens of the Confederacy, as a public enemy, during the continuance of the war. And if he were disloyal in fact, and if by his purchase of the cotton he gave aid and comfort to the rebellion, as the court adjudges, the impediment which such conduct previously interposed to the prosecution of his claim was removed by the proclamation of Pardon and Amnesty made by the President on the 25th day of December, 1868.

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§ 30. **Contracts to aid the confederacy void.**—All contracts entered into for the purpose of aiding the Confederate government are considered illegal and void, and will not be enforced in the federal tribunals.[10] An agent living in one of the states in rebellion had no right to take Confederate money, or bank notes secured by Confederate bonds, in discharge of a debt due to his principal, who lived in a state loyal to the Union.[11]

§ 31. **Ordinance of secession a nullity.**—The ordinances of secession passed by various southern states were absolutely void, and in no manner affected the jurisdiction of the supreme court of the state nor the relation it always bore to the appellate power of the supreme court of the United States.[12] The state continued to be during the Rebellion the same political organization as before,[13] and, therefore, a state adjudication in favor of the validity of an act of the Confederate Congress, which the state recognizes and enforces as a law, and which must, consequently, be considered as a statute of that state, is subject to review by the supreme court of the United States.[14] In the jurisprudence of that court nothing is more firmly established than that all acts done in aid of the Rebellion were illegal and of no validity.[15]

. . . . He was in possession of the property at the time of the seizure, asserting ownership to it; and no one then disputed, and no one since has disputed his title. Who, then, owned the property, if he did not. The United States did not own it. They did not acquire by its seizure any title to the property. They have never asserted any greater rights arising from capture of property on land in the hands of citizens engaged in the rebellion, than those which one belligerent nation asserts with reference to such property captured by it belonging to the citizens or subjects of the other belligerent. All public property which is movable in its nature, possessed by one belligerent, and employed on land in actual hostilities, passes by capture. But private property on land, except such as becomes booty when taken from enemies in the field or besieged towns, or is levied as a military contribution upon the inhabitants of the hostile territory, is exempt from confiscation by the general law of nations.''

[10] Hanauer v. Doane, 79 U. S. (12 Wall.) 342, 20 L. ed. 439; Hanauer v. Woodruff, 82 U. S. (15 Wall.) 439, 21 L. ed. 224.

[11] Fretz v. Stover, 89 U. S. (22 Wall.) 198, 22 L. ed. 769.

[12] White v. Cannon, 6 Wall. 443, 450, 18 L. ed. 923.

[13] Keith v. Clark, 7 Otto, 454, 24 L. ed. 1071.

[14] Ford v. Surget, 7 Otto, 594, 24 L. ed. 1018.

[15] Dewing v. Perdicaris, 6 Otto, 193, 24 L. ed. 654.

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§ 32. **Sale of property of loyal owners.**—Neither a purchaser nor his assignee can obtain any title to the property of loyal owners, sequestered and sold under a statute of the Confederate states.[16] A court created by an act of the Confederate Congress was a nullity, and could possess no rightful jurisdiction, and it afforded no protection to those who assumed to be its officers.[17]

§ 33. **Laws in aid of insurrection void.**—The courts of the United States cannot recognize as valid or binding any law made to aid or promote the Rebellion. A law passed by a legislature of a state in rebellion authorizing and requiring a city to redeem notes issued by it as currency did not make such bills valid.[18] So, treasury notes authorized to be issued by the legislature of Mississippi, when it was in insurrection, inasmuch as they were issued against the public policy and in violation of the Constitution of the United States, are illegal and void, and cannot be received in payment of taxes.[19] While the courts declared that it was impossible to state by exact definitions what acts of such government were valid and what invalid, still, it was conceded that acts necessary to peace and good order among citizens, such as those sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulat-

[16] Dewing v. Perdicaris, 6 Otto, 193, 24 L. ed. 654; Central R. etc. Co. v. Ward, 37 Ga. 515. See, also, United States v. One Thousand Five Hundred Bales Cotton, 27 Fed. Cas. No. 15,958.

[17] Hickman v. Jones, 9 Wall. 197, 19 L. ed. 551. And see as to the nullity of ordinances of secession, Keppel v. Petersburg R. Co., Chase, 167, 14 Fed. Cas. No. 7722; United States v. Cathcart, 1 Bond, 556, 25 Fed. Cas. No. 14,756; Shortridge v. Macon, Chase, 136, 22 Fed. Cas. No. 12,812; Penn v. Tollison, 26 Ark. 545; Hawkins v. Filkins, 24 Ark. 286; Scruggs v. Huntsville, 45 Ala. 222; Nosely v. Tuthill, 45 Ala. 621, 6 Am. Rep. 710; Ex parte Norton, 44 Ala. 180; Ray v. Thompson, 43 Ala. 434, 94 Am. Dec. 696; Pennywitt v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Harlan v. State, 41 Miss. 566; Hood v. Maxwell, 1 W. Va. 219.

[18] Thomas v. City of Richmond, 12 Wall. 349, 20 L. ed. 453.

[19] Taylor v. Thomas, 22 Wall. 479, 22 L. ed. 789. See, also, Evans v. Richmond, Chase (U. S.), 551, 8 Fed. Cas. No. 4570; Huntington v. Texas, 16 Wall. 411, 21 L. ed. 316; Hatch v. Burroughs, 1 Woods (U. S.), 439, 11 Fed. Cas. No. 6203; Perdicaris v. Charleston Gaslight Co., Chase (U. S.), 435, 19 Fed. Cas. No. 10,974; Isaacs v. Richmond, 90 Va. 30, 17 S. E. 760; Rand v. State, 65 N. C. 194, 6 Am. Rep. 741; Mississippi Cent. R. Co. v. State, 46 Miss. 157; Buchanan v. Smith, 43 Miss. 91; Sequestration Cases, 30 Tex. 689, 98 Am. Dec. 494.

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ing the conveyance and transfer, real and personal, of property, providing remedies for injuries to person and estate, and similar acts which would be valid if proceeding from a lawful government, should in general be considered valid as though they had emanated from an actual, though unlawful, government. On the other hand, acts in furtherance or support of rebellion, or intended to defeat the just rights of citizens, must be regarded, in general, as invalid and void.[20]

§ 34. **Judgments of courts, when void.**—Where legislation of the revolutionary legislatures enacted for the purpose of aiding the Rebellion, or which deprived citizens of the United States of their just rights, was effectuated by judgments and decrees of courts, such judgments and decrees are void, and no subsequent legislation can validate them.[21] After the state of Virginia had passed an ordinance of secession, a law was enacted which declared that after its enactment, no execution, except in favor of the state and against nonresidents, should be issued, and that no sales should be made under deeds of trust or decrees without the consent of the parties interested, until otherwise provided by law. This clause that no executions should issue or sales be made was, the court decided, clearly in conflict with the contract clause of the Constitution. The exception in the statute as to executions in favor of the commonwealth and against nonresidents obviously contemplated the confiscation of the latter as a war measure, and was invalid by reason of the treasonable motive and purpose which prompted its authors to pass it.[22] Although the states were in rebellion, only such acts as impaired or tended to impair the national supremacy were invalid, but all others that tended to preserve order, protect property or maintain police regulations were valid.[23]

[20] Texas v. White, 7 Wall. 733, 19 L. ed. 227.

[21] Van Epps v. Walsh, 1 Woods (U. S.), 598, 28 Fed. Cas. No. 16,850.

[22] Daniels v. Tearney, 102 U. S. 419, 26 L. ed. 187.

[23] Horn v. Lockhart, 17 Wall. 580, 21 L. ed. 657. And see, also, Thomas v. Richmond, 12 Wall. 357, 20 L. ed. 453; United States v. Horne Ins. Co., 22 Wall. 103, 22 L. ed. 816; Sprott v. United States, 20 Wall. 459, 22 L. ed. 371; Wallace v. State, 33 Tex. 445; Evans v. Richmond, Chase (U. S.), 551, 8 Fed. Cas. No. 4570; Cook v. Oliver, 1 Woods (U. S.), 437, 6 Fed. Cas. No. 3164; Chappell v. Doe, 49 Ala. 155; Calhoun v. Kellogg, 41 Ga. 240; Buchanan v. Smith, 43

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§ 35. **No general rule to be applied.**—Between the extremes of what was unlawful and what was lawful there was a large variety of transactions, to which no general rule can be applied. Such transactions between individuals as would have been binding and legal under ordinary circumstances cannot be declared illegal and of no obligation because they were done in conformity with laws enacted by a usurping authority. But such transactions of the usurping power as prejudiced the interests of citizens of other states excluded by the insurrection and by the policy of the national government from the care and protection of their own interests within the states in rebellion cannot be sustained by the courts.[24] In other words, when the decision of the court could not, from the nature of the case, be influenced by the rebellion in existence, the judgment of the court is binding on the parties who were actually within the jurisdiction of the court.[25]

§ 36. **State cannot negotiate for extradition.**—Under this clause of the Constitution a state cannot enter into any negotiation with a foreign power on the subject of the extradition of those charged with crime. This is included within the treaty-making power of the federal government and the corresponding power of appointing and receiving ambassadors and other public ministers. There is no reason why states should in their own name make a demand upon foreign nations for the surrender of fugitives from justice; nor should they enter into those relations with such nations as the extradition of fugitives necessarily implies.[26] In 1872 an act of the legislature of the state of New York, authorizing the rendition to foreign states of fugitives from justice, was held to be in conflict with the Constitution of the United States.[27]

§ 37. **Holmes case.**—The power of a state to surrender a fugitive from justice came before the supreme court of the United

Miss. 90; Hill v. Boylan, 40 Miss. 618; Morgan v. Keenan, 1 S. C. 327; Prince William School Board v. Stuart, 80 Va. 81; Frierson v. Presbyterian Church, 7 Heisk. (Tenn.) 705.

[24] Keppel v. Petersburg R. Co., Chase (U. S.), 167, 14 Fed. Cas. No. 7722.

[25] Cook v. Oliver, 1 Woods (U. S.), 437, 6 Fed. Cas. No. 3164.

[26] United States v. Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425.

[27] People v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483.

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States in Holmes v. Jennison,[28] in 1840. George Holmes, a naturalized citizen of the United States, who was charged with having committed murder in Lower Canada, was confined in Vermont under a warrant of arrest issued by the governor of that state, directing the sheriff of one of the counties to convey and deliver him to the agent of Canada, "or to such person or persons as by the laws of said province may be authorized to receive the same, at some convenient place on the confines of this state and the said Province of Lower Canada, to the end that he, the said George Holmes, may be thence conveyed to the said District of Quebec, and be there dealt with as to law and justice appertains." At that time no extradition treaty existed between the United States and Canada, and hence the President declined to act, alleging a want of power. Holmes secured a writ of *habeas corpus* from the supreme court of Vermont, and in his return to the writ the sheriff stated that he detained him under an order from the governor, commanding him, the sheriff, to deliver the prisoner up to the authorities of Lower Canada. The supreme court of that state held the return to be sufficient. Holmes then prosecuted a writ of error to the supreme court of the United States. In this proceeding two questions were presented to the court: First, whether a writ of error would lie from the supreme court of the United States to the supreme court of the state; and second, whether the judgment of the state court was right. The case was heard before eight judges of the federal supreme court, who, on the first of these questions, equally divided, thus preventing an authoritative decision upon the principal question. Chief Justice Taney, in his opinion, upheld the appellate jurisdiction of the supreme court of the United States, and declared against the right attempted to be exercised by the governor of Vermont, and his opinion was concurred in by Justices Story, McLean and Wayne. Separate opinions, in which Justice Baldwin joined, were delivered by Justices Thompson, Barbour and Catron, in which the power of the supreme court of the United States to revise the judgment of the supreme court of Vermont was denied, but in which any clear opinion upon the power of the authorities of the state of Vermont, executive or judicial, to deliver Holmes to the government of Canada was

[28] 14 Pet. 540, 10 L. ed. 579.

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not expressed. Upon the return of the case to the supreme court of Vermont, Holmes was discharged, the chief justice of that court saying: "I am authorized by my brethren, to say that on an examination of this case, as decided by the Supreme Court of the United States, they think, if the return had been as it now is, a majority of that court would have decided that Holmes was entitled to his discharge, and that the opinion of a majority of the Supreme Court of the United States was also adverse to the exercise of the power in question by any of the separate states of the Union." [29]

§ 38. **Treaties now govern.**—The supreme court of the United States sustained, later, the opinion of Chief Justice Taney, that the power exercised by the governor of Vermont was a part of the foreign intercourse of this country conferred upon the federal government, but said: "Fortunately, this question, with others, which might arise in the absence of treaties or Acts of Congress, on the subject, is now of very little importance, since, with nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern the rights and conduct of the parties in such cases. These treaties are also supplemented by Acts of Congress, and both are in their nature exclusive." [30]

[29] Ex parte Holmes, 12 Vt. 631.

[30] United States v. Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425.

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CHAPTER III.

COMPACTS BETWEEN STATES.

§ 39. Clause as to compact with other states.
§ 40. Nature of compacts that may be made by states.
§ 41. Extent and meaning of clause.
§ 42. To what compacts does the Constitution apply.
§ 43. Boundaries between two states.
§ 44. Controversies at time of adoption of Constitution.
§ 45. Boundary between South Dakota and Nebraska.
§ 46. Construing compacts between two states.
§ 47. Disputed boundary between United States and state.
§ 48. Suits by state to recover penalties.
§ 49. Approval of Congress implied from subsequent legislation.
§ 50. Creation of mutual estoppel.
§ 51. Contract of state to exempt property from taxation.
§ 52. Subsequent statutes directing taxation of such property.
§ 53. Compacts relating to property.

§ 39. **Clause as to compacts with other states.**—Another clause of the Constitution prohibiting a state from making a compact or agreement with another state or with a foreign power is the following: "No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will admit of no delay."[1] This clause, as originally reported by the Committee on Detail, was numbered Article XIII, and read: "No state, without the consent of the legislature of the United States, shall emit bills of credit, nor make anything but specie a tender in payment of debts; nor lay imposts or duties on imports; nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another state, or with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent as not to admit of a delay until the legislature of the United States can be consulted."

[1] Const., art. I, sec. 10, cl. 3.

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The provisions as to bills of credit and tender were transferred to the first clause of the section, and finally, after the Committee on Style had reported, the convention remodeled the clause and adopted it in its present form.

§ 40. **Nature of compacts that may be made by states.**—While it may be impossible to state with absolute accuracy what compacts or agreements may be made by the states individually, yet it is clear that the inhibition upon the power of the states is aimed at the formation of any combination having a tendency to augment the political power in the states which may diminish or interfere with the supremacy of the general government. Judge Story, in commenting upon this clause of the Constitution, after referring to the prohibition against a state entering into treaties, alliances, or confederations, and its power, with the consent of Congress, to enter into an agreement or compact with another state or with a foreign power, observes: "What precise distinction is here intended to be taken between *treaties, agreements* and *compacts*, is nowhere explained, and has never as yet been subjected to any exact judicial, or other examination. A learned commentator, however, supposes that the former ordinarily relate to subjects of great national magnitude and importance, and are often perpetual, or for a great length of time; but that the latter relate to transitory or local concerns, or such as cannot possibly affect any other interests but those of the parties. But this is at best a very loose and unsatisfactory exposition, leaving the whole matter open to the most latitudinarian construction. What are subjects of great national magnitude and importance? Why may not a compact or agreement between states be perpetual? If it may not, what shall be its duration? Are not treaties often made for short periods, and upon questions of local interest, and for temporary objects?"[2] He then remarks that the language of the clause, preventing treaties, alliances or confederations, may plausibly be interpreted from the terms used; and "upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are

[2] 2 Story on Constitution, sec. 1402, citing 1 Tucker's Blackstone's Commentaries, App. 310.

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leagued for mutual government, political co-operation, and the exercise of political sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges. The latter clause, 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land situated in the territory of each other; and other internal regulations for the mutual comfort and convenience of states, bordering on each other."[3]

§ 41. Extent and meaning of clause.—In an original suit in the supreme court of the United States to establish by judicial decree the true boundary line between the states of Virginia and Tennessee, and in which the boundary line as established by the compact of 1803 was determined to be the true boundary line, Mr. Justice Field had occasion to consider the extent and meaning of the clause that no state shall, without the consent of Congress, among other things, "enter into any agreement or compact with another state or with a foreign power." He put the proposition in the form of a question, "Is the agreement made without the consent of Congress between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, within the prohibition of the clause?" and then proceeded:

"The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.

"There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly

[3] 2 Story on Constitution, sec. 1403.

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be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibit through that state in that way. If the bordering line of two states should cross some malarious and disease producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus remove the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session."[4]

§ 42. **To what compacts does the Constitution apply.**—He then asked, if the terms "compact" or "agreement" do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply, and stated that the answer would depend upon the object of the constitutional provision and the construction of the terms "agreement" and "compact" with reference to it. The prohibition is directed against any combination increasing the political power of the states by which the supremacy of the United States might be endangered. He then continued:

"Compacts or agreements—and we do not perceive any difference in the meaning, except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'—cover all stipulations affecting the conduct or claims of the parties. The mere selection of parties to run and designate the boundary line between two states, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such

[4] State of Virginia v. State of Tennessee, 148 U. S. 518, 13 Sup. Ct. Rep. 728, 37 L. ed. 537.

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action of itself does not come within the prohibition. Nor does a legislative declaration, following such line, that it is correct, and shall thereafter be deemed the true and established line, import by itself a contract or agreement with the adjoining state. It is a legislative declaration which the state and individuals affected by the recognized boundary line may invoke against the state as an admission, but not as a compact or agreement. The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it, for example, as made upon a similar declaration of the border or contracting state. The mutual declarations may then be reasonably treated as made upon mutual considerations. The compact or agreement will then be within the prohibition of the Constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected, and thus encroach or nót upon the full and free exercise of federal authority. If the boundary established is so run as to cut off an important and valuable portion of a state, the political power of the state enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary or rather for its adoption afterward, the consent of Congress may well be required. But the running of a boundary may have no effect upon the political influence of either state; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey, would in no respect displace the relation of either of the states to the general government. There was, therefore, no compact or agreement between the states in this case which required, for its validity, the consent of Congress, within the meaning of the Constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the states. Such ratification was mutually made by each state in consideration of the ratification of the other."[5]

[5] State of Virginia v. State of Tennessee, 148 U. S. 518, 13 Sup. Ct. Rep. 728, 37 L. ed. 537.

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§ 43. **Boundaries between two states.**—The supreme court of the United States has original jurisdiction of questions of boundary between two states of the Union.[6] Under the Articles of Confederation Congress was made "the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever," and it was provided, for the exercise of such jurisdiction, that "whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons, each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as Congress shall direct, shall in the presence of Congress be drawn out, and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall adjudge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in

[6] Virginia v. West Virginia, 11 Wall 39, 20 L. ed. 67.

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either case transmitted to Congress, and lodged among the acts of Congress for the securities of the parties concerned."[7]

§ 44. **Controversies at time of adoption of Constitution.**—When the Constitution was adopted, there were controversies between eleven states regarding boundaries, which had continued from the first settlement of the colonies.[8] "The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more states. And that a controversy between two or more states, in respect to boundary, is one to which, under the Constitution, such judicial power extends, is no longer an open question in this court."[9]

§ 45. **Boundary between South Dakota and Nebraska.**—Commissioners were appointed by the states of South Dakota and Nebraska, respectively, for the purpose of settling the boundary line between them; and the legislature of each state adopted. subject to the approval of Congress, the boundary line so established. The governors of these states, as authorized by the acts of the legislature, signed in behalf of their respective states a compact, fixing a certain line as a boundary. Congress by an act approved July 24, 1897, enacted: "That the consent of the Congress of the United States is hereby given to the said compact, and all its declarations are hereby confirmed."[10]

§ 46. **Construing compacts between two states.**—The jurisdiction of the supreme court of the United States of questions of

[7] Articles of Confederation, art. IX. Provision was made that no state should be deprived of territory for the benefit of the United States.

[8] Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233, 1260.

[9] United States v. Texas, 143 U. S. 640, 12 Sup. Ct. Rep. 488, 36 L. ed. 291; New Jersey v. New York, 30 U. S. (5 Pet.) 284, 8 L. ed. 127; Florida v. Georgia, 58 U. S. (17 How.) 478, 15 L. ed. 181; Alabama v. Georgia, 64 U. S. (23 How.) 505, 16 L. ed. 556; Virginia v. West Virginia, 78 U. S. (11 Wall.) 39, 20 L. ed. 67; Missouri v. Kentucky, 78 U. S. (11 Wall.) 395, 20 L. ed. 116; Indiana v. Kentucky, 136 U. S. 479, 34 L. ed. 329; Nebraska v. Iowa, 143 U. S. 359, 36 L. ed. 186.

[10] 30 Stats. at Large, 214.

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boundary between two states is not curtailed, because the decision of the question requires the court to examine and construe compacts or agreements between those states, or because such decision may affect the territorial limits of the political jurisdiction and sovereignty of the states.[11] A question arose as to the right of West Virginia, after its separation from Virginia, to jurisdiction over three counties, and it was held that its right could only be maintained by a valid agreement between the two states, and that the consent of Congress was essential to the validity of such agreement. It was agreed, however, between these states that these counties should become a part of West Virginia, subject to the sole condition that the voters of these counties should consent. The admission of West Virginia as a state was consented to by Congress, with the contingent boundaries provided for in its Constitution, and it was held that the action of the governor of Virginia upon the vote of such counties to become a part of West Virginia was, as between the two states, conclusive.[12]

§ 47. Disputed boundary between United States and a state.—While the jurisdiction of the supreme court of the United States to determine a disputed boundary between two states is clear, the question arose whether that court could take cognizance of an original suit brought by the United States against a state to determine the boundary between one of the territories and such state. It was contended that such jurisdiction did not exist, and that the only manner in which such a dispute could be determined was by an agreement in some form between the state and the federal government. But it was decided that the court did have jurisdiction to hear and determine the controversy, and that a suit in equity was the appropriate remedy.[13]

In an earlier case, an action had been brought by the United States against the state of North Carolina upon certain bonds issued by that state. An appearance was made in behalf of the state, the case heard upon its merits and the state had judg-

[11] Virginia v. West Virginia, 78 U. S. (11 Wall.) 39, 20 L. ed. 67.

[12] Virginia v. West Virginia, 78 U. S. (11 Wall.) 39, 20 L. ed. 67.

[13] United States v. Texas, 143 U. S. 640, 12 Sup. Ct. Rep. 488, 36 L. ed. 291.

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ment. No point was made as to the jurisdiction of the court, and the opinion was silent upon the subject.[14] It was said, however, in a later case, that the question of jurisdiction did not escape the attention of the court, and that the judgment would not have been rendered except upon the theory that jurisdiction of a suit by the United States against a state is vested in the supreme court of the United States.[15]

§ 48. **Suits by state to recover penalties.**—It does not follow that because a state is the plaintiff that the controversy is one in which the supreme court of the United States is empowered to grant relief against another state or its citizens, for it was not intended to confer upon the courts of the United States jurisdiction of a suit by one state of such a nature that, on the settled principles of public and international law, it could not be entertained by the judiciary of the other state. It is a well-recognized rule that the courts of one country do not execute the penal laws of another. This principle applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of a state to recover pecuniary penalties for violations of statutes, for the protection of its revenue or other municipal laws. The nature of the cause of action is not altered by a judgment recovered upon it, and, hence, when a judgment is presented to a court for enforcement, it may ascertain whether the claim is one that it is authorized to enforce. The supreme court of the United States has no jurisdiction over an original action brought to compel an insurance corporation of one state to pay to another state the amount of a judgment recovered by such state for a penalty imposed by its own statute upon such corporation for doing business within the state, without having first given to the proper officer of the state a statement of its property and business which the statute required.[16]

[14] United States v. North Carolina, 136 U. S. 211, 10 Sup. Ct. Rep. 920, 34 L. ed. 336.

[15] United States v. Texas, 143 U. S. 640, 12 Sup. Ct. Rep. 488, 36 L. ed. 291.

[16] Wisconsin v. Pelican Ins. Co., 127 U. S. 288, 8 Sup. Ct. Rep. 1373, 32 L. ed. 242. Said Mr. Justice Gray, in delivering the opinion of the court: "The statute of Wisconsin, under which the state recovered in one of her own courts, the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of

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§ 49. Approval of Congress implied from subsequent legislation.—While there may be no direct legislation on the subject, a compact entered into between two states as to the boundary line between them may be fairly implied from subsequent legislation and proceedings. Even if a boundary line between two states varies in some particulars from the courses given in the original grant, still if it has been run out, located and marked upon the earth, and the states have for a long course of years recognized and acquiesced in the line, it becomes conclusive.[17] Mr. Justice Field, delivering the opinion of the court, said: "The Constitution does not state when the consent shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent

another state, doing business in the state of Wisconsin without having deposited with the proper officer of the state a full statement of its property and business during the previous year. Wis. Rev. Stats., sec. 1920. The cause of action was not any private injury, but solely the offense committed against the state by violating her law. The prosecution was in the name of the state, and the whole penalty when recovered would accrue to the state, and be paid, one-half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. Wis. Stats. 1885, c. 395. The real nature of the case is not affected by the forms provided by the law of the state for the punishment of the offense. It is immaterial whether by the law of Wisconsin, the prosecution must be by indictment or by action; or whether under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias* or by a new suit. In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense. This court, therefore, cannot entertain an original action to compel the defendant to pay to the state of Washington a sum of money in satisfaction of the judgment for that fine. The original jurisdiction of this court is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed (if indeed it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a state in her own courts against a citizen of another state for the recovery of any sum of money, however small, by way of a fine for any offense, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting the Federal Constitution."

[17] State of Virginia v. State of Tennessee, 148 U. S. 518, 13 Sup. Ct. Rep. 728, 37 L. ed. 537.

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will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be implied, and is always to be implied, when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them; and observes that where a state is admitted into the Union, notoriously upon a compact made between it and the state of which it previously composed a part, there the act of Congress, admitting such state into the Union is an implied consent to the terms of the compact. Knowledge by Congress of the boundaries of a state, and of its political subdivisions, may reasonably be presumed, as much of its legislation is affected by them, such as relate to the territorial jurisdiction of the courts of the United States, the extent of their collection districts, and of districts in which process, civil and criminal, of their courts may be served and enforced."[18]

§ 50. **Creation of mutual estoppel.**—Where a boundary line has been recognized by two states for a long term of years, it becomes the established line between them on the principle of mutual estoppel. But if a boundary line has been actually run and established, it cannot be changed by the action of the state authorities in recognition of another line, unless both states have continuously recognized such line for such a length of time as to create a mutual estoppel and to operate as an adoption of such line as the true and established boundary.[19]

If two states have by acts of their legislatures confirmed the boundary line between them as run and marked by a joint commission, such line must, in a suit between private persons, be accepted by the courts as the true and ancient boundary, although

[18] State of Virginia v. State of Tennessee, 148 U. S. 518, 13 Sup. Ct. Rep. 728, 37 L. ed. 537. That was an original suit in the supreme court of the United States, to establish by judicial decree the true boundary line between the states of Virginia and Tennessee. The court adjudged that the boundary line as established in 1803 by compact was the true boundary line.

[19] Belding v. Hebard, 103 Fed. 542, 43 C. C. A. 296.

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a different line between two points may more accurately conform to a general call.[20]

§ 51. Contract of state to exempt property from taxation.—The provisions of the Constitution prohibiting a state, without the consent of Congress, entering into any agreement or compact with another state came before the supreme court for consideration in a case where the validity of a contract between a state and a railroad company exempting the latter from taxes in consideration of a percentage of its gross earnings was involved. The Constitution of the state of Minnesota contains clauses providing that all taxes to be raised in the state shall be as nearly equal as may be, and that all property on which taxes are to be levied shall have a cash valuation, and shall be uniform throughout the state; and also declaring that laws shall be passed taxing all real and personal property according to its true value in money.[21] Congress granted certain lands to the state to aid in building a railroad, and provided "that the said lands hereby granted, when patented to said state, shall be subject to the disposal of said state for the purposes aforesaid and no other; and the said railroad shall be and remain a public highway for the use of the government of the United States free from all toll or other charge, for the transportation of any property or troops of the United States."[22] The legislature of that state passed an act accepting the grant and transferring the lands to a railroad company to aid it in the construction of the railroad, and providing that, in consideration of this grant, the company should, after the completion of its railroad, pay into the treasury three per cent of its gross earnings, "which sum shall be in lieu and in full of all taxation and assessments upon the said railroad, and its appurtenances and appendages, and all other property of said company, real, personal and mixed, including the lands hereby and heretofore granted to said company, or so intended to be granted." But the lands were to be taxed when they were sold and conveyed to purchasers. An amendatory act was passed, making some alterations, and providing that when its provisions should be accepted, "the same shall become obligatory upon the

[20] Stevenson v. Fain, 116 Fed. 147, 53 C. C. A. 467.

[21] Minn. Const., art. 9, secs. 1, 3.

[22] 13 Stats. at Large, 64; 14 Stats. at Large, 93.

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state and upon said company." The railroad company continued for many years to pay taxes in accordance with this contract, and no attempt was made by the state to levy taxes upon its lands.

§ 52. **Subsequent statutes directing taxation of such property.** An amendment, years after the making of this contract, was adopted to the Constitution of the state, declaring that any law providing for the repeal or amendment of any law similar to that in question should, before it became effective, be submitted to a vote of the people and ratified by them. Finally, a law was passed by the legislature and adopted by the people, by the terms of which all lands granted to any railroad company were to be assessed and taxed as other lands in the state, but the provision requiring the payment of a percentage of its gross earnings into the treasury was retained.

Under the provisions of this act the state proceeded to levy taxes upon the lands of a railroad company with which such contract was made, and the validity of such taxation was the question involved. The decision of the supreme court of Minnesota was adverse to the railroad company.[23] The supreme court of the United States held that the power reserved in the constitutional amendment to alter, amend or repeal the statute exempting the railroad company from all other taxes in payment of the percentage of its earnings could not be exercised so as to continue in full the obligation as to the payment of the percentage, and to deny at the same time to the company the exemption given by the contract.[24] This contract, it was said by Mr. Justice Brewer, was not in violation of the provisions of the Constitution of Minnesota, because it was made by the state as a trustee of the public lands granted to it in aid of railroads, and as the state had accepted the property as a trustee, it was not forced to diminish the full performance of the trust by subjecting the lands to taxation if in its opinion as trustee the transfer of the land subject to a limited taxation would more effectually accomplish the trust.[25]

[23] State v. Stearns, 72 Minn. 200, 75 N. W. 210.

[24] Stearns v. Minnesota, 179 U. S. 223, 21 Sup. Ct. Rep. 73, 45 L. ed. 162.

[25] Stearns v. Minnesota, 179 U. S. 223, 21 Sup. Ct. Rep. 73, 45 L. ed. 162. The supreme court of the United States possesses paramount au-

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§ 53. **Compacts relating to property.**—Mr. Justice Brewer, after referring to the enabling act and the Constitution of the state, said that it was evident that they, in form at least, made a compact between the United States and the state. "In an inquiry as to the validity of such a compact," said he, "this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two states, or between a state and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only if the power of a state to deal with the nation or with any other state in reference to such property. The case before us is one involving simply an agreement as to property between a state and the nation. That a state and the nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this court, and that they have been frequently made in the admission of new states is a matter of history." He said that if the right of agreement between one another belongs to the several states except as

thority when reviewing the final judgment of a state court which upholds a state statute alleged to violate the contract clause of the Constitution, to determine the existence or nonexistence of the contract set up, and whether the obligation has been impaired by the statute. Douglas v. Kentucky, 168 U. S. 488, 8 Sup. Ct. Rep. 199, 42 L. ed. 553; Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; Wright v. Nagle, 101 U. S. 791, 25 L. ed. 923; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 6 Sup. Ct. Rep. 265, 29 L. ed. 510; Vicksburg S. & P. R. Co. v. Dennis, 116 U. S. 665, 6 Sup. Ct. Rep. 625, 29 L. ed. 770; New Orleans Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18, 8 Sup. Ct. Rep. 741, 31 L. ed. 607; Bryan v. Kentucky Conference M. E. Church etc., 151 U. S. 639, 14 Sup. Ct. Rep. 465, 38 L. ed. 297; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. Rep. 968, 38 L. ed. 793; Bacon v. Texas, 163 U. S. 207, 16 Sup. Ct. Rep. 1023, 41 L. ed. 132.

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limited by the constitutional provisions requiring the consent of Congress, "equally true is it that a state may make a compact with all the states, constituting as one body the nation, possessed of general right of sovereignty and represented by Congress."[26]

[26] Stearns v. Minnesota, 179 U. S. 223, 21 Sup. Ct. Rep. 73, 45 L. ed. 162.

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CHAPTER IV.

MAKING OF TREATIES.

§ 54. Power to make treaties.
§ 55. Difference of opinion as to where power should be vested.
§ 56. Vehement attack on treaty clauses.
§ 57. Objections to lodging power with President.
§ 58. Differences between treaty-making power in England and in United States.
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§ 60. Prerogative of the Executive.
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§ 62. Ratification of treaties by Senate.
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§ 77. Suspension of act prohibiting imports.
§ 78. Same subject—Continued.
§ 79. Importation of neat cattle.
§ 80. Products of Cuba and Porto Rico.
§ 81. Appropriation of money.
§ 82. Moral obligation.
§ 83. Alaska purchase.
§ 84. Porto Rico as foreign territory.
§ 85. Treaty dependent upon legislative action.

§ 54. Power to make treaties.—The Constitution places the power to make treaties in the hands of the President, by and with the advice and consent of the Senate, if two-thirds of the senators present concur.[1] The clause on this subject found its origin in the Committee on Detail, who in their first report placed the treaty-

[1] Const., art. II, sec. 2, cl. 2.

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making power in the Senate by a clause reading: "The Senate o the United States shall have power to make treaties, and appoin embassadors, and judges of the Supreme Court." When th convention took up this clause for consideration, an amendmen was moved by Gouverneur Morris that "no treaty shall be bind ing on the United States which is not ratified by law," but afte some debate the entire clause was reported back to the Commit tee on Detail. As this committee did not return a further re port, the matter went to the Committee on Unfinished Portions who, when they reported, vested the power in the President by and with the advice and consent of the Senate.

§ 55. Difference of opinion as to where power should be vested.—The language of the report of the Committee on Unfinished Portions was: "The President, by and with the advice and consent of the Senate, shall have power to make treaties. . . . . But no treaty shall be made without the consent of two-thirds of the members present." An amendment was offered in the convention to add the words "and House of Representatives" after "Senate," but it failed to carry. Much difference of opinion was manifested on the provision that required two-thirds of the senators present to ratify a treaty, some of the members advocating an amendment whereby treaties of peace could be ratified by a majority and others wishing to eliminate completely the requirement of a two-thirds vote. It was also urged that "no treaty should be made without the consent of two-thirds of *all* the members of the Senate," and also that "no treaty shall be made without a majority of the whole number of the Senate"; and still again, that previous notice to members and with a reasonable time to attend, should be given. All these propositions were defeated, and the Committee on Style finally reported it in the form in which it now appears in the Constitution.[2]

§ 56. Vehement attack on treaty clauses.—Judge Story said that the plan of the Constitution was happily adapted to secure all just objects in relation to foreign negotiations, while admitting that few parts of the Constitution were assailed with

[2] 5 Elliot, 524-527; The Federalist No. 75; Journal of Convention, 225, 326, 342.

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more vehemence. "In the formation of treaties," he said, "secrecy and immediate dispatch are generally requisite, and sometimes absolutely indispensable. Intelligence may often be obtained, and measures matured in secrecy which never could be done unless in the faith and confidence of profound secrecy. No man at all acquainted with diplomacy, but must have felt that the success of negotiations as often depends upon their being unknown by the public as upon their justice or their policy. Men will assume responsibility in private, and communicate information, and express opinions, which they would feel the greatest repugnance publicly to avow; and measures may be defeated by the intrigues and management of foreign powers, if they suspect them to be in progress, and understand their precise nature and extent. In this view the executive department is a far better depositary of the power than Congress would be. The delays incident to a large assembly; the differences of opinion; the time consumed in debate; and the utter impossibility of secrecy, all combine to render them unfitted for the purposes of diplomacy."[3]

[3] 2 Story on Constitution, sec. 1510.

"The same difficulties would occur from confiding it exclusively to either branch of Congress. Each is too numerous for prompt and immediate action, and secrecy. The matters in negotiations, which usually require these qualities in the highest degree, are the preparatory and auxiliary measures; and which are to be seized upon, as it were, in an instant. The president could easily arrange them. But the House, or the Senate, if in session, could not act, until after great delays; and in the recess could not act at all. To have intrusted the power to either would have been to relinquish the benefits of the constitutional agency of the president in the conduct of foreign negotiations. It is true that the branch so intrusted might have the option to employ the president in that capacity; but they would also have the option of refraining from it; and it cannot be disguised, that pique, or cabal, or personal or political hostility, might induce them to keep their pursuits at a distance from his inspection and participation. Nor could it be expected, that the president, as a mere ministerial agent of such branch, would enjoy the confidence and respect of foreign powers to the same extent as he would, as the constitutional representative of the nation itself; and his interposition would of course have less efficacy and weight.

"On the other hand, considering the delicacy and extent of the power, it is too much to expect that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively, as well as exclusively, upon the subject of treaties. In England, the power to make treaties is exclusively vested in the crown. But however proper it

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§ 57. Objections to lodging power with President.—It was seriously objected that the vesting of the treaty-making power in the President with the concurrence of two-thirds of the senators present was destructive to public liberty and dangerous to the state.[4]

Speaking of the treaty-making power, the Federalist said: "The essence of the legislative authority is to enact laws, or in other words to prescribe rules for the regulation of society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defense, seems to comprise all the functions of the executive magistrate. The power of making treaty is plainly neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."[5]

§ 58. Differences between treaty-making power in England and United States.—Again, the Federalist points out the differences that exist between the treaty-making power in England and that in the United States, asserting that the King of Great Britain is in all foreign transactions the sole and absolute representative of the nation, and intimating that in case of the dissolution of the confederacy, the executives of the several states might be invested with the prerogative of making treaties. It asserted that the King of Great Britain could of his own accord make treaties of peace, commerce, alliance, and of every other description. "It has been insinuated that his authority, in this respect, is not conclusive; and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification

may be in a monarchy, there is no American statesman but must feel that such a prerogative in an American president would be inexpedient and dangerous. It would be inconsistent with that wholesome jealousy which republics ought to cherish of all depositaries of power; and which, experience teaches us, is the best security against the abuse of it." 2 Story on Constitution, 1511, 1512.

[4] 2 Elliot's Debates, 367-379.

[5] The Federalist, 75.

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of parliament. But I believe this doctrine was never heard of till it was broached upon the present occasion. Every jurist of that kingdom, and every other man acquainted with its constitution, knows, as an established fact, that the prerogative of making treaties exists in the crown, in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete validity and perfection, independent of any other sanction. The parliament, it is true, is sometimes seen employing itself in altering the existing laws, to conform them to the stipulations in a new treaty; and this may possibly have given birth to the imagination, that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause; from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws to the changes made in them by the operation of the treaty; and of adopting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can only do with the concurrence of a branch of the legislature. It must be admitted that, in this instance, the power of the federal executive would exceed that of any state executive. But this arises naturally, from the exclusive possession, by the Union, of that part of the sovereign power which relates to treaties. If the confederacy were to be dissolved, it would become a question whether the executives of the several states were not solely invested with that delicate and important prerogative."[6]

§ 59. **Other objections.**—Judge Story stated that one ground of objection was the intermixture of executive and legislative powers, it being contended that the President ought alone to possess the prerogative of concluding treaties. Another objection urged was the small number of the persons to whom the power to make treaties was intrusted, and the opinion was expressed that the House of Representatives should have a voice, as was also the opinion that a treaty should be ratified by two-

[6] The Federalist, 69.

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thirds of all the members of the Senate, and not alone by two-thirds of those present. In answer to the objection that the power ought to have been confined exclusively to the President, he said that it might be suggested, "that, however safe it may be in governments, where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an executive magistrate chosen for four years. It has been remarked, and is unquestionably true, that an hereditary monarch, though often the oppressor of his people, has personally too much at stake in the government to be in any material danger of corruption by foreign powers, so as to surrender any important rights or interests. But a man, raised from a private station to the rank of chief magistrate for a short period, having but a slender or moderate fortune, and no very deep stake in the society, might sometimes be under temptations to sacrifice duty to interests, which it would require great virtue to withstand. If ambitious, he might be tempted to seek his own aggrandizement by the aid of a foreign power, and use the field of negotiations for this purpose. If avaricious, he might make his treachery to his constituents a vendible article at an enormous price."[7]

[7] 2 Story on Constitution, sec. 1515.

He also said: "The impropriety of delegating the power exclusively to the senate has been already sufficiently considered. And, in addition to what has been already urged against the participation of the house of representatives in it, it may be remarked that the house of representatives is for other reasons far less fit than the senate to be the exclusive depositary of the power, or to hold it in conjunction with the executive. In the first place, it is a popular assembly, chosen immediately from the people, and representing in a good measure, their feelings and local interests; and it will on this account be more likely to be swayed by such feelings and interests than the senate, chosen by the states through the voice of the state legislatures. In the next place, the house of representatives are chosen for two years only; and the internal composition of the body is constantly changing, so as to admit of less certainty in their opinions and their measures, than would naturally belong to a body of longer duration. In the next place, the house of representatives is far more numerous than the senate, and will be constantly increasing in numbers, so that it will be more slow in its movements, and more fluctuating in its councils. In the next place, the senate will naturally be composed of persons of more experience, weight of character, and talents than the members of the

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§ 60. **Prerogative of the Executive.**—The courts have no power to interfere with the negotiation and modification of treaties, as such is the prerogative of the Executive.[8] President Washington, in a special message, said: "It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty, negotiated and signed by such officers as final and conclusive, until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think that it would be advisable to observe it in the conduct of our treaties with the Indians; for, though such treaties, being on their part, made by their chiefs or rulers, need not be ratified by them, yet, being formed on our part by the agency of subordinate officers, it seems to be both prudent and reasonable that their acts should not be binding on the nation, until approved and ratified by the government. It

house. Accurate knowledge of foreign politics, a steady and systematic adherence to the same views, nice and uniform sensibility to national character as well as secrecy, decision, and dispatch, are required for a due execution of the power to make treaties. . . . .

"Besides, the very habits of business and the uniformity and regularity of system, acquired by a long possession of office, are of great concern in all cases of this sort. The senators, from the longer duration of their office, will have great opportunities of extending their political information, and of rendering their experience more and more beneficial to their country. The members are slowly changed; so that the body will at all times, from its very organization, comprehend a large majority of persons who have been engaged for a considerable time in public duties and foreign affairs. If, in addition to all these reasons, it is considered that in the senate all the states are equally represented, and in the house very unequally, there can be no reasonable doubt, that the senate is in all respects a more competent and more suitable depositary of the power than the house, either with or without the cooperation of the executive. And most of the reasoning applies with equal force to any participation by the house in the treaty-making functions. It would add an unwieldy machinery to all foreign operations, and retard if not wholly prevent, the beneficial purposes of the power": 2 Story on Constitution, 1516, 1517.

[8] Frelingheysen v. Key, 110 U. S. 64, 3 Sup. Ct. Rep. 462, 28 L. ed. 71; Great West Ins. Co. v. United States, 19 Ct. of Cl. 206; Angarica de la Rua v. Bayard, 4 Mackey, 310.

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strikes me that this point should be well considered and settled, so that our national proceedings in this respect may become uniform, and be directed by fixed and stable principles."[9]

§ 61. **Treaty inchoate until ratified.**—Every treaty negotiated by the United States is an inchoate compact until it is ratified, and as every nation has knowledge of the limitations upon the power of its officers to conclude treaties, it is entirely free to withhold its own ratification until it has knowledge of ratification on the part of the United States. "In the full powers of European governments to their ministers, the sovereign usually *promises* to ratify that which his minister shall conclude in his name; and yet if the minister transcends his instructions, though not known to the other party, the sovereign is not held bound to ratify his engagements. Of this principle Great Britain has once availed herself in her negotiations with the United States. But the full powers of our ministers abroad are necessarily modified by the provisions of our Constitution, and promise the ratification of treaties signed by them, only in the event of their receiving the constitutional sanction of our government."[10] A payment of preliminary installment of money under a treaty providing for a lease of foreign property does not obligate the government to future payments.[11] A treaty, when ratified, relates back to the time of its signature, as a ratification is nothing more than evidence of the authority under which the minister proceeded.[12]

§ 62. **Ratification of treaties by Senate.**—As a treaty, until sanctioned by the constitutional majority of the Senate, is a mere inchoate and not a consummated compact, the other power

[9] 1 Richardson's Messages (Sept. 17, 1789), 61.

[10] Mr. Adams, Secretary of State, to Mr. Rush, November 12, 1824, MS. Inst. U. S. Ministers, X, 215.

[11] Mr. Evarts, Secretary of State, to Mr. Delmonte, February 19, 1880, MS. Notes to Dominican Republic, 1, 41.

[12] United States v. Arredondo, 6 Pet. 758, 8 L. ed. 547. In a dissenting opinion in this case Mr. Justice Thompson said: "A government is bound to perform and observe a treaty made by its minister, unless it can be made to appear that he has exceeded his authority. But a ratification is an acknowledgment that he was authorized to make the treaty; and if so, the nation is bound from the time the treaty is made and signed."

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to the treaty is free to withhold its own ratification until it shall have knowledge of the ratification of the treaty on the part of the United States.[13] Owing to the fact that before a treaty can be ratified, the action of the Senate must be had, it is preferred that the exchange of ratifications shall be effected "as soon as possible," rather than within a time specified.[14]

At first the President met the Senate personally, but the practice became unsatisfactory and was abandoned. Mr. Crandall, speaking of the practice, says: "In reply to the committee, appointed by the Senate August 6, 1789, to confer with the President on the method of communication between the Executive and the Senate respecting treaties and nominations, President Washington suggested that 'In all matters respecting treaties, oral communications seem indispensably necessary, because in these a variety of matters are contained, all of which not only require consideration, but some may undergo much discussion to do which by written communications would be tedious without being satisfactory.' The report of the committee, based upon this suggestion, resulted in the adoption by the Senate, August 21st, of a rule regulating the manner in which the President should meet the Senate, either in the Senate chamber or in such other place as it might be convened by him. The rule had just been adopted when a message was received announcing the President's intention to meet the Senate the next day 'to advise with them on the terms of the treaty to be negotiated with the southern Indians.' Following also the practice under the Articles of Confederation of securing prior to the negotiation of Indian treaties an appropriation to defray the necessary expense, President Washington had, on August 7th, suggested by special message to both houses the necessity of negotiating with the Indians in the southern district, and the expediency of appointing commissioners for that purpose. The House bill making the appropriation was approved August 20th. According to the notification, the President, accompanied by General Knox, who, although not a Cabinet officer at the time, was acquainted with Indian affairs and prepared to answer questions, appeared in the Senate chamber. After listening to a short paper containing a few ex-

[13] Mr. Adams, Secretary of State, to Mr. Rush, November 12, 1884, MS. Inst. U. S. Ministers, X, 215.

[14] Instructions to Diplomatic Officers of the United States (1897), sec. 246, p. 101.

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planations, the Senate was called upon to give its advice by answering yes or no to seven questions. This it seemed unwilling to do without having first examined the articles. To a motion made by Robert Morris, to refer the papers to a special committee, a Senator well objected that 'No council ever committed anything.' The President added that, while he had not objection to a postponement, he did not understand 'the matter of commitment,' that it would defeat every purpose of his meeting the Senate. The questions were accordingly postponed until Monday, at which time they were settled by the Executive and the Senate. The latter maintained its co-ordinate authority by a partial consent to the propositions.

"Although the President did not again meet the Senate in person to ask its advice, he continued to consult it by message prior to the opening of negotiations."[15]

§ 63. **Rejection of treaties by Senate.**—The rejection of a treaty by the Senate indicates no discourtesy to the government negotiating the treaty. "The United States can enter into no treaty without the advice and consent of the Senate, and that advice and consent to be intelligent must be discriminating, and their refusal can be no subject of complaint, and give no occasion for dissatisfaction or criticism."[16]

[15] Crandall's Treaties, Their Making and Enforcement, 54, 56.

[16] Mr. Fish, Secretary of State, to Mr. Motley, Minister to England, May 15, 1869, Sen. Ex. Doc. 11, 41 Cong. 3 Sess. 2-5.

Says Mr. Crandall: "Of treaties rejected by the Senate through a failure to act on them, or outright, may be mentioned, besides the various recent treaties for commercial reciprocity, the important treaties signed March 25, 1844, with the German Zollverein; July 20, 1855, with Hawaii; October 24, 1867, with Denmark for the cession of the islands of St. Thomas and St. John; November 29, 1869, for the annexation of the Dominican Republic; December 10, 1824, with Colombia for the suppression of the African slave trade; March 6, 1835, with the Swiss Confederation; April 12, 1844, for the annexation of Texas; December 14, 1859, with Mexico relative to transits and commerce; March 5, 1860, with Spain for the settlement of claims; May 21, 1867, with Hawaii for commercial reciprocity; and the following with Great Britain: January 14, 1869, for the adjustment of outstanding claims; June 25, 1886, for the extradition of criminals; February 15, 1888, for the regulation of the fisheries; and January 11, 1897, for the settlement of disputes by arbitration." Crandall's Treaties, Their Making and Enforcement (1904), 71, 72.

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Frequently the Senate makes amendments, and if these are not adopted by the other party to the treaty, it, of course, does not become operative. For instance, a treaty was signed in London in 1803 for settling the northern boundaries of the United States, and the Senate approved it on condition that a clause should be stricken out, but as the amendment was not accepted by the British government, ratifications were not exchanged.[17] In another instance a convention for suppressing the African slave trade was signed at London and submitted to the Senate in 1824. The Senate approved the conventions but with conditions which Great Britain did not accept.[18]

[17] Mr. Fish, Secretary of State, to Mr. Motley, Minister to England, May 15, 1869, Sen. Ex. Doc. 11, 41 Cong. 3 Sess. 4, 5; 1 Moore's Int. Arbitrations, 514; 5 Moore's Int. L. Deg. 199.

[18] Mr. Fish, Secretary of State, to Mr. Motley, Minister to England, May 15, 1869, Sen. Ex. Doc. 11, 41 Cong., 3 Sess. 4, 5; 5 Moore's Int. L. D. 199, 200. Mr. Clay, Secretary of State, referring to the Senate's amendment said: "The government of His Britannic Majesty is well acquainted with the provision of the Constitution of the United States, by which the Senate is a component part of the treaty-making power; and that the consent and advice of that branch of Congress are indispensable in the formation of all treaties. According to the practice of this government, the Senate is not ordinarily consulted in the initiatory state of a negotiation, but its consent and advice are only invoked, after a treaty is concluded, under the direction of the President, and submitted to its consideration. Each of the two branches of the treaty-making authority is independent of the other, whilst both are responsible to the States and to the people, the common sources of their respective powers. It results, from this organization, that, in the progress of the government, instances may sometimes occur of a difference of opinion between the Senate and the Executive as to the expediency of a projected treaty, of which the rejection of the Colombian convention affords an example. The people of the United States have justly considered that, if there be any inconveniences in this arrangement of their executive powers, those inconveniences are more than counterbalanced by the greater security of their interests, which is effected by the mutual checks which are thus interposed. But it is not believed that there are any inconveniences to foreign powers of which they can with propriety complain. To give validity to any treaty, the consent of the contracting parties is necessary. As to the mode by which that consent shall be expressed, it must necessarily depend with each upon its own peculiar constitutional arrangement. All that can rightly be demanded in treating is to know the contingencies on the happening of which that consent is to be regarded as sufficiently testified. This information the government of the United States has always communicated to the foreign powers with which it treats, and to none more fully than to the United Kingdom of Great

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"Not usually consulted as to the conduct of negotiations, the Senate has freely exercised its co-ordinate authority in treaty-making by means of amendments. Where the treaty as negotiated is not entirely acceptable to the Senate, it is the practice of that body, if it gives its advice and consent to the ratification, to do so with specific amendments, which renders unnecessary the resubmission of the instrument after the consent of the other party to the designated changes has been obtained. But the approval, whether qualified or unqualified, of the treaty by the Senate is not to be confused with the act of ratification. The latter is performed by the President, and is unconditional even where it relates to a treaty which, because of amendments by the Senate, differs from the one first signed. While the Senate's practice of amending treaties continues to meet with criticism by foreign writers, it would not be contended for a moment that the Senate might not reject *in toto*, or withhold action altogether until the changes which it might indicate by resolution or otherwise had been negotiated. So far as it affects the other contracting party, it is difficult to distinguish the latter mode from that followed by the United States. The objection usually urged is, that the amendments are made by persons unfamiliar with the negotiations, and that they are in the nature of an ultimatum. The proposed treaty is not infrequently so amended as to be unacceptable to the other power, and no treaty results."[19]

§ 64. Views of Mr. Clay.—The Senate in 1824 approved a convention for the suppression of the African slave trade, but added conditions which Great Britain did not accept, and speaking of the amendments made by the Senate, Mr. Clay said: "The government of His Britannic Majesty is well acquainted

Britain and Ireland. Nor can it be admitted that any just cause of complaint can arise out of the rejection by one party of a treaty which the other has previously ratified. When such a case occurs, it only proves that the consent of both, according to the constitutional precautions which have been provided for manifesting that consent, is wanting to make the treaty valid. One must necessarily precede the other in the act of ratification; and if, after a treaty be ratified by one party, a ratification of it be withheld by the other, it merely shows that one is, and the other is not, willing to come under the obligations of the proposed treaty." Mr. Clay to Mr. Addington, April 6, 1825, Am. State Papers For. Rel., V, 783.

[19] Crandall's Treaties, Their Making and Enforcement, 70, 71.

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with the provision of the Constitution of the United States, by which the Senate is a component part of the treaty-making power; and that the consent and advice of that branch of Congress are indispensable in the formation of all treaties. According to the practice of this government, the Senate is not ordinarily consulted in the initiatory state of a negotiation, but its consent and advice are only invoked, after a treaty is concluded, under the direction of the President, and submitted to its consideration. Each of the two branches of the treaty-making authority is independent of the other, whilst both are responsible to the States and to the people, the common sources of their respective powers. It results, from this organization, that, in the progress of the government, instances may sometimes occur of a difference of opinion between the Senate and the Executive as to the expediency of a projected treaty, of which the rejection of the Colombian convention affords an example. The people of the United States have justly considered that, if there be any inconveniences in this arrangement of their executive powers, those inconveniences are more than counterbalanced by the greater security of their interests, which is effected by the mutual checks which are thus interposed. But it is not believed that there are any inconveniences to foreign powers of which they can with propriety complain. To give validity to any treaty, the consent of the contracting parties is necessary. As to the mode by which that consent shall be expressed, it must necessarily depend with each upon its own peculiar constitutional arrangement. All that can rightly be demanded in treating is to know the contingencies on the happening of which that consent is to be regarded as sufficiently testified. This information the government of the United States has always communicated to the foreign powers with which it treats, and to none more fully than to the United Kingdom of Great Britain and Ireland. Nor can it be admitted that any just cause of complaint can arise out of the rejection by one party of a treaty which the other has previously ratified. When such a case occurs, it only proves that the consent of both, according to the constitutional precautions which have been provided for manifesting that consent, is wanting to make the treaty valid. One must necessarily precede the other in the act of ratification; and if, after a treaty be ratified by one party, a ratification of it be withheld by the other, it merely shows that

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one is, and the other is not, willing to come under the obligations of the proposed treaty."[20]

As a ratification by the Senate is essential to the full execution of a treaty, it is competent for the President to withhold from the Senate a treaty that has been negotiated, or he may submit a treaty with a recommendation that it be amended in certain particulars, and treaties may also be withheld either for the purpose of modification by negotiation or of termination of proceedings on them.[21]

[20] Mr. Clay, Secretary of State, to Mr. Addington, April 6, 1825, Am. State Papers, For. Rel., V, 783.

[21] Mr. Crandall on this subject says: "As all treaties must receive this final ratification, the President may at will, so far as depends on his constitutional power, withhold from the Senate a treaty already negotiated. Of treaties thus withheld the Monroe-Pinkney treaty with Great Britain of December 31, 1806, a treaty with Mexico signed March 21, 1853, relative to a transit way across the Isthmus of Tehuantepec, an extradition convention with Colombia signed March 30, 1872, a convention with Switzerland signed February 14, 1885, for the protection of trademarks, and the convention adopted in April, 1890, by the First International American Conference for the establishment of a tribunal of arbitration, are examples. Or the treaty may be submitted, accompanied with recommendations for amendments. President Pierce in submitting on February 10, 1854, the Gadsden treaty of December 30, 1853, recommended certain amendments. President Cleveland in submitting, July 5, 1888, an extradition treaty signed May 7, 1888, with Colombia, called attention to changes suggested by the Secretary of State. On December 16, 1845, President Polk communicated to the Senate an extradition treaty, signed January 29, 1845, with Prussia, and certain other German states, and at the same time suggested a modification of Article III, in which it was stipulated, contrary to the rule then consistently maintained by the United States, that the contracting parties should not be bound to deliver up their own citizens. The Senate having failed to make the amendment in its resolution of June 21, 1848, advising the ratification, the President, for this as well as for other reasons, refused to ratify the treaty.

"So also treaties may be withdrawn from the consideration of the Senate either to effect changes by negotiation or to terminate proceedings on them. A treaty with Belgium, signed November 4, 1884, regulating the right of succession to and the acquisition of property, was withdrawn from the Senate by President Arthur by a message of February 17, 1885, and was not resubmitted. President Cleveland in messages of March 13, 1885, April 2, 1885, and March 9, 1893, requested the return of treaties concluded by his predecessors—November 18, 1884, with Spain for commercial reciprocity; December 1, 1884, with Nicaragua relative to the construction of an interoceanic canal; December 4, 1884, with the Dominican Republic for commercial reciprocity; an article signed June

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§ 65. Adding declaration.—When a written declaration is annexed by one of the parties to the treaty at the time of its ratification for the purpose of explaining ambiguous language or of adding a new and distinct stipulation, and the treaty with such declaration attached is afterward ratified by the other party, the declaration becomes a part of the treaty.[22] But a proviso made by one party that a treaty shall be considered effective only on certain conditions may be considered as directory merely.[23]

The treaty made in 1819 between the United States and the King of Spain annuls the grant of lands in Florida by the King of Spain to the Duke of Alagon, irrespective of the fact whether it takes date from the royal order of December 17, 1817, or from

23, 1884, with the Argentine Confederation supplementary to the treaty of commerce of July 27, 1853; and the Hawaiian annexation treaty signed February 14, 1893. President Roosevelt, in a message of December 8, 1902, requested the return of a commercial convention with the Dominican Republic signed June 25, 1900, together with an additional article thereto, and a convention with Great Britain signed January 30, 1897, relative to the demarcation of the Alaskan boundaries. Instances of withdrawals for the purpose of making slight changes are quite numerous. The convention with Spain, signed August 7, 1882, supplementary to the extradition convention of January 5, 1877, was returned for verbal changes at the request of the Secretary of State made to the chairman of the Committee on Foreign Relations." Crandall's Treaties, Their Making and Enforcement, 82, 83.

Speaking of treaties rejected by the Senate, he says: "Of treaties rejected by the Senate, through a failure to act on them, or outright, may be mentioned, besides the various recent treaties for commercial reciprocity, the important treaties signed March 25, 1844, with the German Zollverein; July 20, 1855, with Hawaii; October 24, 1867, with Denmark for the cession of the islands of St. Thomas and St. John; November 29, 1869, for the annexation of the Dominican Republic; December 10, 1824, with Colombia for the suppression of the African slave trade; March 6, 1835, with the Swiss Confederation; April 12, 1844, for the annexation of Texas; December 14, 1859, with Mexico relative to transits and commerce; March 5, 1860, with Spain for the settlement of claims; May 21, 1867, with Hawaii for commercial reciprocity; and the following with Great Britain: January 14, 1869, for the adjustment of outstanding claims; June 25, 1886, for the extradition of criminals; February 15, 1888, for the regulation of the fisheries; and January 11, 1897, for the settlement of disputes by arbitration." Crandall's Treaties, Their Making and Enforcement, 71, 72.

[22] Doe v. Braden, 16 How. 635, 14 L. ed. 1090.

[23] New York Indians v. United States, 170 U. S. 22, 18 Sup. Ct. Rep. 531, 42 L. ed. 927.

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the grant of February 6, 1818, by reason of a declaration to that effect which the President of the United States made on the presentation of the treaty for an exchange of ratifications, and to which the King of Spain gave his assent in writing, and which was again ratified by the Senate of the United States.[24]

§ 66. **Proviso adopted by Senate.**—The Senate adopted several amendments to a treaty between the United States and the New York Indians, which had been duly signed and submitted to the Senate, and also added a proviso that the treaty should have no force or effect until the acceptance of these amendments, and that if any part of the Indians should fail to emigrate, the President should deduct a quantity of land from that granted to them. The proviso was not found either in the original or in the published copy of the treaty, or in the proclamation of the President publishing the treaty. The question arose whether the proviso ever became operative, and the government relied upon Doe v. Braden,[25] but the court said that the question in that case was whether the king had power to annul the grant, which was considered a political and not a judicial question, and that from the fact that the annulling clause had been inserted in the ratification and published in both countries as part of the treaty, there could be no question whatever of concealment. But as to the proviso added by the Senate to the Indian treaty, the court said: "In any event it is difficult to see how it can be regarded as part of the treaty or as limiting at all the terms of the grant. The power to make treaties is vested by the Constitution in the President and Senate, and while this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President. It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate and House of Representatives. There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power, or an Indian tribe; a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a

[24] Doe v. Braden, 16 How. 635, 14 L. ed. 1090.

[25] 16 How. 635, 14 L. ed. 1090.

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particular case may demand it."[26] The supplemental article of the treaty of 1800 was appended to the treaty after it was signed, and therefore cannot be referred to for the purpose of explaining the preceding articles.[27]

§ 67. **Amendment by declaration of interpretation.**—A treaty cannot be amended without the consent of the Senate by making a declaration of interpretation. The American Minister at Athens was authorized in 1864 to conclude with Greece a convention relative to the registration of trademarks. He conferred with the minister for foreign affairs of that country, and was advised that the ratification of the chamber of deputies was necessary to the execution of the convention, and that much time might elapse, owing to the condition of affairs then existing, before the consent of that body could be secured. The American Minister signed with the minister for foreign affairs a declaration, which by means of an interpretation of the existing treaty attempted to accomplish the purpose desired. The Department of State took the view that the treaty then in existence was not susceptible of the construction placed upon it, and deemed the declaration to be in effect a new treaty, which could be ratified only by the President, with the advice and consent of the Senate. The State Department maintained this view, and as there was a disinclination on the part of the government of Greece to negotiate a formal convention, instructions were sent to the American Minister to proceed no further.[28]

§ 68. **Views of Department of State.**—It was proposed by a protocol or declaration to determine the construction of certain provisions of the convention of March 14, 1884, relating to submarine cables, and the American Minister was authorized to sign the protocol subject to the approval of the Senate. The

[26] New York Indians v. United States, 170 U. S. 22, 18 Sup. Ct. Rep. 531, 42 L. ed. 927.

[27] The Tom, 39 Ct. of Cl. 290.

[28] Mr. Uhl, Acting Secretary of State, to Mr. Alexander, No. 21, May 16, 1894, For. Rel. 1894, 293; Mr. Alexander, to Mr. Gresham, Secretary of State, No. 41, July 21, 1894, For. Rel. 1894, 295; Mr. Gresham to Mr. Alexander, No. 43, February 21, 1895, For. Rel. 1895, II, 759; Mr. Olney, Secretary of State, to Mr. Alexander, No. 75, November 9, 1895, Id. 763.

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Secretary of State was requested to authorize the signing of the protocol unconditionally. With this request he did not comply and in a note to the American Minister to France stated:

"By the Constitution of the United States treaties made under the authority of the United States are a part of the supreme law of the land, and the convention of the 14th of March, 1884 having been made in accordance with the Constitution, is a part of that supreme law.

"But, whilst it is true that treaties are a part of the supreme law of the land, they are nevertheless to be viewed in two lights; that is to say, in the light of politics and in the light of judicial law. Where the construction of a treaty is a matter of national policy, the authoritative construction is that of the political branch of the government. It is the function of the Executive or of Congress, as the case may be. When a political question is so determined, the courts follow that determination. Such was the decision of the Supreme Court in cases arising under the treaty of 1803 with France, of 1819 with Spain, and of 1848 with Mexico.

"But where a treaty is to be construed merely as a municipal law, affecting private rights, the courts act with entire independence of the Executive, in construing both the treaty and the legislation that Congress may have adopted to carry it into effect. And while great weight might be given by the courts to an opinion of the Executive in that relation, such an opinion would not be regarded as having controlling force."

He stated that the declaration in question was intended to determine two questions, that of penal responsibility, for the accidental or necessary breaking or injury of a cable in an attempt to repair another cable; and that of civil responsibility, for injuries done to a cable in an effort to lay or repair another cable.

"These are judicial questions," he declared, "to be determined by the courts before whom the appropriate suits may be brought. The only power that can authoritatively construe a treaty for the judicial tribunal on questions of the character described is the legislature, or the treaty-making power itself. In either case the result would be a law which would be binding upon the courts.

"It is to be observed in this connection that the treaty in question is not self-executing, and that it requires appropriate legislation to give it effect. If, under these circumstances, the Execu-

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tive should now assume to interpret the force and effect of the convention, we might hereafter have the spectacle, when Congress acted, of an Executive interpretation of one purport and a different Congressional interpretation, and this in a matter not of Executive cognizance.

"For the reasons stated it was not deemed expedient to authorize you to sign the declaration unconditionally. And as the session of Congress was drawing to a close when the note of the French minister was received, and it seemed impracticable to secure the Senate's ratification of the declaration before adjournment, it was not thought best to send you such telegraphic instructions as were solicited.

"I desire, however, to refer to an incident in our diplomatic history which bears upon the matter under consideration and which might have been regarded as a precedent for the Executive in this case, if circumstances had seemed to require a different course from that which has been taken. I refer to the protocol which accompanies the treaty of Guadalupe Hidalgo, in the volume of treaties between the United States and other powers. . . . . The expressed object of this protocol was to explain the amendments of the Senate. It was defended by the administration on this ground; and in a message to the House of Representatives, the President stated that 'had the protocol varied the treaty, as amended by the Senate of the United States, it would have no binding effect.' But notwithstanding this explanation, the course of the President in not submitting the protocol to the Senate before the exchange of ratifications of the treaty was severely criticised in Congress."[29]

§ 69. Senate resolution controlling meaning of treaty.—The meaning of a treaty cannot be controlled by a resolution of the Senate adopted by a vote of less than two-thirds of a quorum that it was not intended to have a certain effect. After the ratification of the treaty with Spain, by which the Philippine Islands were ceded to the United States, the Senate adopted a resolution, "That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine

[29] *Mr. Bayard,* Secretary of State, to Mr. McLane, Min. to France, Nov. 24, 1886, For. Rel. 1887, 274.

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Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands, to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the United States and the inhabitants of said islands."[30] Mr. Chief Justice Fuller, speaking of the effect of this resolution, said: "It is enough that this was a joint resolution; that it was adopted by the Senate by a vote of 26 to 22, not two-thirds of a quorum; and that it is absolutely without legal significance in the question before us. The meaning of the treaty cannot be controlled by subsequent explanations of those who may have voted to ratify it. What view the House might have taken as to the intention of the Senate in ratifying the treaty we are not informed, nor is it material; and if any implication from the action referred to could properly be indulged in it would seem to be that two-thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated."

Mr. Justice Brown, in a concurring opinion, declared that the case would not be essentially different if the resolution had been adopted by a unanimous vote of the Senate. "Obviously, the treaty," said he, "must contain the whole contract between the parties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty. If, for instance, the treaty with Spain had contained a provision instating the inhabitants of the Philippines as citizens of the United States, the Senate might have refused to ratify it until this provision was stricken out. But it could not, in my opinion, ratify the treaty and then adopt a resolution declaring it not to be its intention to admit the inhabitants of the Philippine Islands to the privileges of citizen-

[30] 32 Cong. Rec., 55 Cong., p. 1847.

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ship of the United States. Such resolution would be inoperative as an amendment to the treaty, since it had not received the assent of the President or the Spanish commissioners."[31]

§ 70. **Executive agreements.**—The President has frequently, pending negotiations for a permanent settlement of controversies, made agreements taking the shape of an exchange of notes or of a formal protocol. These, ordinarily, are not submitted to the Senate for ratification. An agreement of this character, commonly called a *modus vivendi*, was made with Great Britain in 1891, to provide for the protection of fur seals in Bering Sea. While negotiations for a treaty of arbitration were pending, a similar *modus vivendi* was concluded in 1893, but as it admitted the possibility of a future award of damages against the United States, it was submitted to the Senate. In 1899, pending the permanent settlement of the boundary of Alaska, a *modus vivendi* was concluded, and likewise while the ratification of the convention signed February 15, 1888, for the adjustment of the question relating to the northeastern fisheries, was pending, a *modus vivendi* was arranged by the commissioners of the United States and Great Britain.[32] In 1877 a "protocol of conference and declarations concerning judicial procedure was signed by Mr. Cushing, as minister plenipotentiary of the United States to Spain, and Señor Calderon y Collantes, as Spanish minister of state. Certain pledges were contained in the protocol on the part of Spain, as to the treatment of citizens of the United States residing in her ultramarine possessions, while Mr. Cushing made, on the part of the United States, certain declarations as to the state of the existing law in that country."[33]

§ 71. **Protocols within executive authority.**—"Protocols of agreement as to the basis of future negotiations are clearly within Executive authority. Such are, for instance, the protocols signed with Costa Rica and Nicaragua, December 1, 1900, in reference to possible future negotiations for the construction of an interoceanic canal by way of Lake Nicaragua. . . . . The final

[31] The Diamond Rings, 183 U. S. 176, 22 Sup. Ct. Rep. 59, 46 L. ed. 138.

[32] J. W. Foster, Treaty-making Power Under the Constitution, 11 Yale Law Journal, 77 (Dec., 1901).

[33] United States Treaty, Volume 1030.

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protocol signed at Peking, September 7, 1901, by the allied powers on the one hand, and by China, on the other, at the conclusion of the Chinese troubles, likewise was not submitted to the Senate."[34]

On October 20, 1899, a provisional boundary line between Alaska and the Dominion of Canada, in the vicinity of Lynn Canal, was effected through a *modus vivendi*, by an exchange of notes between Mr. Hay, Secretary of State, and Mr. Tower, British chargé d'affaires at Washington.[35] In 1882, Mr. Frelinghuysen, Secretary of State, and Señor Romero, the Mexican Minister, arranged for the reciprocal crossing and recrossing of the frontier, by the troops of the United States and Mexico, in pursuit of marauding Indians, and this agreement was prolonged successively until 1886. On June 4, 1896, an agreement of a more formal character for the same purpose was entered into between Mr. Olney and Señor Romero, who by the Mexican Senate was authorized to enter into the agreement.[36]

Mr. Foster, Secretary of State, in a report to the President, stated that "an exchange of diplomatic notes has often sufficed without any further formality of ratification or exchange of ratifications, or even of proclamation, to effect purposes more usually accomplished by the more complex machinery of treaties."[37]

[34] Crandall's Treaties, Their Making and Enforcement, 87.

[35] For. Rel. 1899, 328-330.

[36] For. Rel. 1882, 419, 421; For. Rel. 1896, 438.

[37] Sen. Ex. Doc. 9, 52 Cong. 2 Sess., H. Doc. 471, 56 Cong. 1 Sess. 16, 17. In that report he said: "On December 9, 1850, in a conference held at the foreign office in London between the United States Minister, Abbott Lawrence and Lord Palmerston, it was agreed that the Canadian territory of Horseshoe Reef, in the Niagara River, should be ceded to the United States for the purpose of erecting a lighthouse thereon. A memorandum, or protocol, of this agreement was drawn up and signed by Mr. Lawrence and Lord Palmerston. On receipt of this protocol, Mr. Webster, January 17, 1851, instructed Mr. Lawrence to 'address a note to the British secretary of state for foreign affairs, acquainting him that the arrangement referred to is approved by this government.' Mr. Lawrence did so on the 10th of February, 1851, and the acknowledgment of his note by the British secretary of state closed the transaction. No ratification occurred on either side. Congress appropriated money for the erection of a lighthouse which was built; and the United States thus possesses and exercises full jurisdiction over territory acquired by cession from a foreign power without a treaty."

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§ 72. Instances.—In 1899, an agreement was entered into by Brigadier-General Bates, with the Sultan of Sulu and his principal chiefs, acknowledging the sovereignty of the United States over the archipelago, suppressing piracy, providing for free trade in the products of the archipelago with the Philippine Islands, protecting the sultan against foreign aggression, and providing for the payment of certain salaries to the sultan and his associates in the administration of the islands. President McKinley, in his annual message of 1899, stated that he had confirmed the agreement subject to the action of Congress, and with the reservation, communicated to the Sultan at Sulu, that the agreement should not be deemed a consent on the part of the United States to the existence of slavery in the archipelago.[38] In 1871 a settlement of claims of American citizens arising from the acts of the Spanish authorities in Cuba was arranged by an exchange of notes between General Sickles, the American Minister to Spain, and the Spanish minister of state.[39]

The President is empowered by section 13 of the law of March 3, 1891, to extend the benefits of international copyright to citizens and subjects of a foreign state when he has received assurance that citizens of the United States are allowed the benefit of copyright in that state, on the basis substantially as its own citizens, or when it appears that the state is a party to an international agreement providing for reciprocity in the granting of copyright, and permitting the United States at its pleasure to become a party. The benefits of this has been extended by the President to the subjects of several nations, among them Belgium, Great Britain, France, Switzerland, Germany, Italy, Denmark, Portugal, Spain, Mexico, Chile, Costa Rica, Netherlands, Cuba and Norway. "Following the postal convention with New Granada of March 6, 1844, numerous other conventions of the same nature were concluded by the President and ratified with the consent of the Senate. By the act of June 8, 1872, the Postmaster-General is given the power to enter into money-order agreements with the post departments of foreign governments, and by and with the advice and consent of the President, to negotiate and conclude postal conventions. In virtue of this act, con-

[38] For. Rel. 1899, XLIX.

[39] Report of Mr. Foster, Secretary of State, to the President, December 7, 1892; H. Doc. 471, 56 Cong. 1 Sess. 17; Sen. Ex. Doc. 9, 56 Cong. 1 Sess.

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ventions of this class have been concluded by the Executive without submission to the Senate. Among these are the Universal Postal Conventions, signed at Vienna, July 4, 1891, and at Washington, June 15, 1897."[40]

§ 73. **Suspension of tariff act by President.**—A section of a tariff act which authorizes the President to suspend the provisions of the act relating to the introduction, free of duty, of certain articles is not unconstitutional. It cannot be said to be liable to the objection that it transfers legislative and treaty-making power to the President.[41]

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The Act of October 1st, 1890, in the particular under consideration, is not inconsistent with the principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea, and hides, Congress itself determined that the provisions of the Act of October 1st, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, 'he may deem,' in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products."[42]

[40] Crandall's Treaties, Their Making and Enforcement, 92.

[41] Field v. Clark, 143 U. S. 649, 12 Sup. Ct. Rep. 495, 36 L. ed. 294.

[42] Field v. Clark, 143 U. S. 649, 12 Sup. Ct. Rep. 495, 36 L. ed. 294.

"Ten commercial arrangements were concluded and made effective

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§ 74. No discretion in the President.—The view taken of the powers of the President in such a case is that while he may, and must, exercise his discretion in determining whether, as a fact, a certain event has or has not occurred, still when he has determined as a fact that an event has happened authorizing him to issue a proclamation, it becomes his duty to issue such proclamation. In the language of Mr. Justice Harlan, speaking for the court, "when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What

by means of this section—January 31, 1891, with Brazil; June 4, the Dominican Republic; June 16, Spain; December 30, Guatemala; January 30, 1892, Germany; February 1, Great Britain; March 11, Nicaragua; April 29, Honduras; May 25, Austria-Hungary; and November 29, Salvador. These were all terminated by section 71 of the tariff act of August 27, 1894. . . . . Section 3 of the act of July 24, 1897, not only provides, as did section 3 of the act of 1890, for the imposition by proclamation of certain differential rates, but also for the conclusion by the President of commercial agreements, with countries producing certain enumerated articles, in which concessions may be secured in favor of the products of the United States; and it further authorizes the President, when such concessions are, in his judgment, reciprocal and equivalent, to suspend, by proclamation, the collection on those articles of the regular duties imposed by the Act, and subject them to special rates as provided in the section. On the authority of this section the President has concluded and made effective the commercial agreements of May 28, 1898, with France; May 22, 1899, with Portugal (protocol making corrections signed January 11, 1900); July 10, 1900, with Germany; and February 8, 1900, with Italy." Crandall's Treaties, Their Making and Enforcement, 88-90.

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the President was required to do was simply in execution of the Act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspension certain duties should be imposed."[43]

§ 75. **Nonintercourse act.**—The nonintercourse act of 1809 forbade the importation, after a certain date, of goods, wares, or merchandise from any port or place in Great Britain or France, with the proviso that the President of the United States should be authorized, in case either France or Great Britain shall so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation, and that after the making of the proclamation, the trade suspended by that act, and the act imposing an embargo, could "be renewed with the nation so doing."[44] This act expired on May 1, 1810, and on that day another act was passed by Congress in which it was declared that in case either Great Britain, before a certain day, should so revoke or modify her edicts "as that they shall cease to violate the neutral commerce of the United States, which fact the President of the United States shall declare by proclamation," and if the other nation shall not, within a specified time, revoke or modify her edicts in like manner, then certain sections of the act of 1809 "shall from and after the expiration of three months from the date of the proclamation aforesaid, be revived and have full force and effect, so far as relates to the dominions, colonies, and dependencies, and to the articles, the growth, produce or manufacture of the dominions, colonies, and dependencies of the nation thus refusing or neglecting to revoke or modify her edicts in the manner aforesaid." It was further provided that "the restrictions imposed by this Act shall, from the date of such proclamation, cease

[43] Field v. Clark, 143 U. S. 49, 12 Sup. Ct. Rep. 495, 36 L. ed. 294.

[44] 2 Stats. at Large, 528.

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and be discontinued in relation to the nation revoking or modifying her decrees in the manner aforesaid."[45]

President Madison, in 1810, issued a proclamation to the effect that France had either revoked or modified her edicts in such a manner that they ceased to violate the neutral commerce of the United States. It was contended that it was incompetent for Congress to transfer legislative power to the President, and that the making of a law dependent upon the proclamation of the President was to give to that proclamation the effect of a law. The answer made to this contention was that the legislature did not transfer any power of legislation to the President, but only prescribed the evidence which should be admitted of a fact, upon the occurrence of which the law should go into effect. The court held that the legislature might make the revival of an act dependent upon a future event, and might also provide that event to be made known by proclamation. A subsequent act of Congress reviving a prior act revives it precisely in the same form and with the same effect that it had at the moment of its expiration.[46]

§ 76. Suspension and operation of acts dependent upon President.—An act approved June 4, 1794, during the administration of Washington, authorized the President, when Congress was not in session and for a specified period, "whenever, in his opinion, the public safety shall so require, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances may require, and to continue or revoke the same, whenever he shall think proper."[47] In 1798, by an act approved on the 13th of June of that year, commercial intercourse between the United States and France and its dependencies was suspended. But the act provided that if the government of France, and all persons acting by or under its authority, before the next session of Congress should "clearly disavow," and should "be found to refrain from the aggressions, depredations, and hostilities which have been and are by them encouraged and maintained against the vessels and other property of the citizens of the United States,

[45] 2 Stats. at Large, 605, 606.

[46] Brig Aurora v. United States, 7 Cranch, 382, 3 L. ed. 378.

[47] 1 Stats. at Large, 372.

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and against their natural rights and sovereignty, in violation of the faith of treaties and the laws of nations," and should "thereby acknowledge the just claims of the United States to be considered as in all respects neutral, and unconnected in the present European war, if the same shall be continued, then and thereupon, it shall be lawful for the President of the United States, being well ascertained of the premises, to remit and discontinue the prohibitions and restraints hereby enacted and declared; and he shall be and is hereby authorized to make proclamation thereof accordingly."[48] By a subsequent act approved February 9, 1799, commercial intercourse with France and its dependencies was further suspended, and it was provided by this act that at any time after its passage, "it shall be lawful for the President of the United States, if he shall deem it expedient and consistent with the interest of the United States, by his order, to remit and discontinue, for the time being, the restraints and prohibitions aforesaid, either with respect to the French Republic, or to any island, port, or place belonging to the said republic, with which a commercial intercourse may safely be renewed; and also to revoke such order whenever, in his opinion, the interest of the United States shall require; and he shall be, and hereby is, authorized to make proclamation thereof accordingly."[49] Under this act, on June 26, 1799, and May 21, 1800, proclamations were issued by the President declaring it lawful for vessels departing from the United States to enter certain ports of San Domingo.[50]

§ 77. **Suspension of act prohibiting imports.**—Congress passed an act, approved April 18, 1806, making it unlawful to import into the United States from any port or place in Great Britain or Ireland; or in any of the colonies or dependencies of Great Britain, articles of which leather, silk, hemp, flax, tin, or brass was the material of chief value, woolen cloths whose invoice prices exceeded five shillings sterling per square yard, woolen hosiery, manufactures of glass, silver and plated wares, hats, nails, spikes, ready-made clothing, millinery, beer, ale, porter, pictures and prints.[51] By the subsequent act of December 19, 1806, the operation of the act above mentioned was suspended, with a section

[48] 1 Stats. at Large, 565.
[49] 1 Stats. at Large, 613.
[50] 9 Life and Works of John Adams, 176, 177.
[51] 2 Stats. at Large, 379.

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that the President was authorized "to suspend the operation of the aforesaid act, if in his judgment the public interest should require it; provided that such suspension shall not extend beyond the second Monday in December next."[52] In 1815 an act was passed providing that so much of the several acts imposing duties on the tonnage of ships and vessels, and on goods, wares and merchandise imported into the United States, as imposed a discriminating duty on tonnage, between foreign vessels and vessels of the United States, and between goods imported into the United States in foreign vessels and vessels of the United States, should be repealed, so far as the same respected the produce or manufacture of the nation to which such foreign ships or vessels belonged. But it was provided that such repeal should take effect in favor of any foreign nation "whenever the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation so far as they operate to the disadvantage of the United States" had been abolished.[53] President Monroe received satisfactory evidence from the Free City of Bremen that after a certain date all discriminating or countervailing duties of the city, so far as they operated to the disadvantage of the United States, had been abolished. Accordingly, on July 24, 1818, he issued a proclamation declaring that the acts of Congress upon that subject were repealed so far as they related to the produce and manufactures of that city, and he issued similar proclamations relative to the produce and manufactures of Hamburg, Lubeck, Norway, and the Dukedom of Ogdenburg.[54]

§ 78. Same subject—Continued.—The act of March 3, 1817, prohibited the importation into the United States, in any foreign vessel, after the fourth day of July of that year, of plaster of paris, the production of any country or its dependencies from which the vessels of the United States were not permitted to bring the same article. The act, by its terms, was to continue in force for five years from a certain date, with the provision that "if any foreign nation or its dependencies which have now in force regulations of the subject of the trade in plaster of paris, prohibiting the exportation thereof to certain ports of the United

[52] 2 Stats. at Large, 411.
[53] 3 Stats. at Large, 224.
[54] 3 Stats. App. 1.

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States, shall discontinue such regulations, the President of the United States is hereby authorized to declare that fact by his proclamation, and the restrictions imposed by this act shall, from the date of such proclamation, cease, and be discontinued in relation to the nation, or its dependencies, discontinuing such regulations."[55] In pursuance of this provision President Monroe issued proclamations respecting the trade with Nova Scotia and New Brunswick.[56]

An act approved January 7, 1824, relating to discriminating duties of tonnage and impost, provided that "upon satisfactory evidence being given to the President of the United States, by the government of any foreign nation, that no discriminating duties of tonnage or impost are imposed or levied within the ports of the said nation, upon vessels wholly belonging to citizens of the United States, or upon merchandise, the produce or manufacture thereof, imported in the same, the President is hereby authorized to issue his proclamation, declaring that the foreign discriminating duties of tonnage and impost within the United States are, and shall be, suspended and discontinued, so far as respects the vessels of the said nation, and the merchandise of its produce or manufacture, imported into the United States in the same; the said suspension to take effect from the time of such notification being given to the President of the United States, and to continue so long as the reciprocal exemption of vessels belonging to the citizens of the United States, and merchandise, as aforesaid, thereon laden, shall be continued, and no longer.[57] The statute

[55] 3 Stats. at Large, 361.

[56] 3 Stats. App. 1.

[57] 4 Stats. at Large, 3. The act of May 24, 1828, contained a similar section. 4 Stats at Large, 308. See, also, U. S. Rev. Stats., sec. 4228. The following proclamations were issued by the Presidents of the United States in execution of these acts: By Adams, July 21, 1828, 4 Stats. App. 815. By Jackson, May 11, 1829, June 3, 1829, September 18, 1830, April 28, 1835, and September 1, 1836, 4 Stats. App. 814, 815, 816; 11 Stats. App. 781, 782. By Polk, November 4, 1847, 9 Stats. App. 1001. By Fillmore, November 1, 1850, 9 Stats. App. 1004. By Buchanan, February 25, 1858, 11 Stats. App. 795. By Lincoln, December 16, 1863, 13 Stats. App. 739. By Johnson, December 28, 1886, and January 29, 1867, 14 Stats. App. 818, 819. By Grant, June 12, 1869, November 20, 1869, February 25, 1871, December 19, 1871, September 4, 1872, and October 30, 1872, 16 Stats. App. 1127-1137; 17 Stats. App. 954-957. By Hayes, November 30, 1880, 21 Stats. at Large, 800.

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of May 31, 1830, repealed all acts and parts of acts imposing duties upon the tonnage of ships and vessels of foreign nations, but provided that the President of the United States should be satisfied of the abolition of the discriminating or countervailing duties of such foreign nations to the extent to which they operated to the disadvantage of the United States.[58]

President Pierce, pursuant to the act of Congress of August 5, 1854, effectuating the treaty between the United States and Great Britain, of June 5, 1854, issued a proclamation on December 12, 1855, declaring that he had received satisfactory evidence that the province of Newfoundland had consented in a due and proper manner to have the provisions of the treaty extended to it, and to allow the United States the benefit of all its stipulations so far as they were applicable, and, therefore, that certain articles specified in the treaty should be admitted from that province free of duty.[59]

§ 79. **Importation of neat cattle.**—Congress, by an act approved March 6, 1866, prohibited the importation of neat cattle and the hides of neat cattle from any foreign country into the United States, but provided in the act that its operation might be suspended as to any foreign country or countries, or any parts of such country or countries, whenever the Secretary of the Treasury should officially determine, and give public notice thereof, that such importation would not tend to the introduction or spread of contagious or infectious diseases among the cattle of the United States. The act also provided that "the President of the United States, whenever in his judgment the importation of neat cattle and the hides of neat cattle may be made without danger of the introduction or spread of contagious or infectious disease among the cattle of the United States, may, by proclamation, declare the provisions of this Act to be inoperative, and the same shall be afterward inoperative and of no effect from and after thirty days from the date of said proclamation."[60]

These provisions were embodied in sections 2493 and 2494 of the Revised Statutes until the passage of the act of March 3,

[58] 4 Stats. at Large, 425. Section 4219 of the Revised Statutes continues this provision.

[59] 10 Stats. at Large, 587; 11 Stats. at Large, 790.

[60] 14 Stats. at Large, 3.

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1883.[61] The tariff act of 1890 also prohibits the importation of neat cattle and the hides of neat cattle from foreign countries, but confers authority upon the Secretary of the Treasury to suspend the operation of the act as to any country when he may determine that such importation will not lead to the introduction or spread of contagious or infectious diseases among the cattle of the United States.[62]

§ 80. **Products of Cuba and Porto Rico.**—President Arthur, acting under the authority of section 4228 of the Revised Statutes, issued a proclamation by which he declared that after the first day of March, 1884, duties on the products of, and articles proceeding from, Cuba and Porto Rico under the Spanish flag should be suspended and discontinued so long as the products of, and articles proceeding from, the United States, imported into those islands should be exempt from discriminating customs duties.[63] President Cleveland, upon the ground that higher and discriminating duties continued to be imposed and levied in these ports upon certain produce, manufactures and merchandise imported into them from the United States and from foreign countries, in vessels of the United States, than were imposed and levied on like produce, manufactures and merchandise carried to those ports in Spanish vessels, revoked by proclamation the suspension made by President Arthur.[64]

An act of Congress, passed in 1884, removed certain burdens on the American merchant marine, and for the purpose of encouraging the American foreign carrying trade imposed certain tonnage duties upon vessels entering the United States from any certain foreign ports. The President, however, was given authority to suspend the collection of so much of those duties, entering from certain ports, as might be in excess of the tonnage and lighthouse dues, or other equivalent tax, imposed on American vessels by the government of the foreign country in which such port was situated, and he was empowered upon the passage of the act, "and from time to time thereafter as it may become necessary by reason of changes in the laws of the foreign coun-

[61] 22 Stats. at Large, 489, c. 121, sec. 6.

[62] 26 Stats. at Large, 616, c. 1244, sec. 20.

[63] 23 Stats. at Large, 835.

[64] 24 Stats. at Large, 1028.

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tries above mentioned, to indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage duty, if any, to be collected under such suspension."[65] Both Presidents Arthur and Cleveland suspended by proclamation the collection of duties on goods arriving from the certain mentioned ports.[66]

§ 81. **Appropriation of money.**—At one time it was contended that if a treaty was made by the United States providing for the appropriation of money, the consent of the House of Representatives was necessary to carry the treaty into effect, and that the power of the House to grant or refuse an appropriation for the purpose was as well known to the other contracting party as was the consent of the Senate to the preliminary adoption of the treaty. Acting on the assumption that the House was free, if so disposed, to refuse appropriation to effectuate a treaty, and might itself determine whether the treaty should be made, the House, on March 24, 1796, asked the President for the facts relative to Jay's treaty, the ratification of which was proclaimed by the President on February 29, 1796, and the proclamation was communicated on March 1, 1796, to the two branches of Congress. President Washington declined to comply with the request, saying: "Having been a member of the general convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject; and from the first establishment of the government to this moment, my conduct has exemplified that opinion, that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every treaty so made and promulgated thenceforward became the law of the land. It is thus that the treaty-making power has been understood by

[65] 23 Stats. at Large, 57.

[66] 23 Stats. at Large, 841, 842, 844.

A practical construction of the Constitution as manifested by many acts of Congress covering a long period of time should not be overruled, unless the court is convinced that such legislation is clearly incompatible with the Constitution. Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. Rep. 279, 28 L. ed. 349; The Laura, 114 U. S. 411, 5 Sup. Ct. Rep. 881, 29 L. ed. 147.

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foreign nations, and in all the treaties made with them *we* have declared and *they* have believed, that, when ratified by the President, with the advice and consent of the Senate, they became obligatory." He stated further that it was clear to his understanding that the assent of the House was not necessary to the validity of a treaty, and "as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light; and as it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request."[67]

Mr. Cushing, attorney general, said that although it may be necessary for Congress in its legislative capacity to carry into effect a treaty that had received the approval of the President and Senate, such action should, under ordinary circumstances, be deemed to be a political duty, and that such legislative assistance had at no time been refused.[68]

§ 82. **Moral obligation.**—A treaty requiring to carry it into effect the payment of money which can be appropriated only by an act of the legislature, places upon Congress a moral obligation to pass the necessary laws for that purpose. A refusal so to do would be to break the public faith, and would give a good and sufficient cause of war. The executive department on which is conferred the right of treating and contracting with other sovereignties must be deemed to be invested with all the power necessary to make a valid contract and as competent to bind at its discretion the national faith.[69]

§ 83. **Alaska purchase.**—The treaty of 1868 with Russia for the cession of Alaska provided that Russia should receive an indemnity of $7,200,000. At the session following the proclama-

[67] 1 Richardson's Messages, 195.

[68] 6 Op. Atty. Gen. 296.

[69] Duer's Outlines of Constitutional Jurisprudence of the United States, 138. "The power to make treaties must be coextensive with the national exigencies, and necessarily involves in it every portion of the national sovereignty of which the co-operation may be necessary to give effect to negotiations and contracts with foreign nations." Id.

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tion of the treaty, when the question of making the appropriation arose, there appeared a division of opinion, the majority of the Committee of Foreign Affairs of the House of Representatives reporting a bill making the necessary appropriation, while a report was made by a minority of the committee recommending the rejection of the purchase. The report of the majority admitted that there were cases in which the House would be justified in withholding its assent, but held that such right would exist only in cases plainly incompatible "with the fundamental principles, purposes or interests of the Constitution"; but that where it is limited to objects consistent with the interests of the government, "its first and highest duty is to enact such measures as are necessary to carry the treaty into effect." After considerable debate, an amendment was passed by the House, in which it was recited that the subjects "embraced in the stipulations of said treaty are among the subjects which, by the Constitution of the United States, are submitted to the power of Congress, and over which Congress has jurisdiction; and it being for such reason necessary that the consent of Congress should be given to said stipulation before the same can have full force and effect, having taken into consideration the said treaty, and approving of the stipulations therein, to the end that the same may be carried into effect," it was enacted: "That the assent of Congress is hereby given to the stipulations of said treaty." The Senate, by restoring the bill to its original form, rejected the position of the House that it was essential to have the consent of Congress as a legislative body to the payment of money and the incorporation of territory when provided for by a treaty, and finally the bill was sent to a committee of conference, which agreed on a bill which recited the making of the treaty "by the terms of which it was stipulated that in consideration of the cession by the Emperor of Russia to the United States of certain territory therein described, the United States should pay to the Emperor of Russia, the sum of $7,200,000 in coin; and whereas it was further stipulated in said treaty that the United States shall accept such cession, and that certain inhabitants of said territory shall be admitted to the enjoyment of all the rights and immunities of citizens of the United States; and whereas said stipulations cannot be carried into full force and effect except by legislation to which the consent of both Houses of Con-

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gress is necessary." It was therefore resolved: "That there be, and hereby is, appropriated from any money in the Treasury not otherwise appropriated $7,200,000 in coin, to fulfill stipulations contained in the sixth article of the treaty," etc.[70] Mr. Crandall, in his work on Treaties, says: "That Congress is under no obligation to make the stipulated appropriation has not been seriously advanced by the House since 1868, although individual advocates of this view have not been wanting."[71]

§ 84. **Porto Rico as foreign territory.**—In a case involving the question whether Porto Rico after its cession to the United States by the treaty with Spain was foreign country within the meaning of the tariff act, the supreme court of the United States said: "It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it, himself; but no act is necessary to make it domestic territory, if once it has been ceded to the United States. We express no opinion as to whether Congress is bound to pay for it. This has been much discussed by writers upon constitutional law, but it is not necessary to consider it in this case, as Congress made prompt appropriation of the money stipulated in the treaty."[72]

§ 85. **Treaty dependent upon legislative action.**—A treaty will operate immediately on all matters not requiring legislative action, but if its operation is made dependent on legislative action, it does not become operative until such action is taken.[73] It is to be presumed that every foreign government knows that where a stipulation is contained in a treaty providing for the payment of money it is necessary to have legislative sanction.[74]

[70] Cong. Globe, 1867-68, 4031, 4159, 4392; Wharton's Int. Law Dig., sec. 131a, II, 21.

[71] Crandall's Treaties, Their Making and Enforcement, 132.

[72] De Lima v. Bidwell, 182 U. S. 1, 198, 21 Sup. Ct. Rep. 743, 45 L. ed. 1041, 1056.

[73] Foster v. Neilson, 2 Pet. 253, 7 L. ed. 411; United States v. Percheman, 7 Pet. 51, 8 L. ed. 604; Garcia v. Lee, 12 Pet. 511, 9 L. ed. 1176; Haver v. Yaker, 9 Wall. 32, 19 L. ed. 571; Turner v. Baptist Union, 5 McLean, 344, 25 Fed. Cas. No. 14,250; Bartram v. Robertson, 15 Fed. 212, 21 Blatchf. 211.

[74] Turner v. Baptist Union, 5 McLean, 347, Fed. Cas. No. 14,250.

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CHAPTER V.

TAKING EFFECT AND TERMINATION OF TREATIES.

§ 86. Time when treaty takes effect.
§ 87. Sovereignty transferred at date of treaty.
§ 88. Postponing operation until approval of Congress.
§ 89. Question before the court.
§ 90. Reasoning of the court.
§ 91. Effect on individual rights.
§ 92. Retroactive effect.
§ 93. Authority of courts.
§ 94. Construction of treaty province of courts.
§ 95. Termination of treaties.
§ 96. Question a political one.
§ 97. Violation of treaty by one nation.
§ 98. Termination of treaties by notice.
§ 99. Subject matter covered by later treaty.

§ 86. Time when treaty takes effect.—Unless some provision is made to the contrary, a treaty becomes binding on the respective governments from the date of its signature. The exchange of ratifications has a retroactive operation.[1] "All treaties, as well those for cessions of territories as for other purposes, are binding upon the contracting parties, unless when otherwise provided in them from the day they are signed. The ratification of them relates back to the time of signing."[2] The treaty between Spain and the United States was signed December 10, 1898, but ratifications were not exchanged until April 11, 1899. Still the act of March 3, 1899, which prohibited unauthorized obstructions to navigation in the waters of the United States, was considered to apply to the navigable waters of Porto Rico.[3]

[1] Davis v. Concordia, 9 How. (U. S.) 280, 13 L. ed. 138; Hylton v. Brown, 1 Wash. C. C. 343, Fed. Cas. No. 6982.

[2] Davis v. Concordia, 9 How. (U. S.) 280, 13 L. ed. 138, per Wayne, J.

[3] Knox, Attorney General, October 17, 1901, 551, 558, citing United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; Haver v. Yaker, 9 Wall. 32, 19 L. ed. 571; United States v. Reynes, 9 How. 127, 13 L. ed. 74; Davis v. Concordia, 9 How. 280, 13 L. ed. 1041; Downes v. Bidwell, 182 U. S. 1, 200, 21 Sup. Ct. Rep. 743, 45 L. ed. 1041; Downes v. Bidwell, 182 U. S. 244, 247, 21 Sup. Ct. Rep. 770, 45 L. ed. 1088; Dooley v. United States, 182 U. S. 222, 230, 21 Sup. Ct. Rep. 762, 45 L. ed. 1074; Halleck Int. Law, 815.

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§ 87. Sovereignty transferred at date of treaty.—As a treaty transfers sovereignty on the day of its date, the grant of a perpetual franchise by the Spanish governor of Louisiana after the treaty by which Spain ceded Louisiana to France, is void.[4] Unless a different time is fixed by the governments making the treaty or must be adopted to fulfill their manifest intention, a treaty will take effect from its date irrespective of its ratification.[5] If a treaty is made dependent on legislative action, it does not become operative until such action.[6] A provision contained in a treaty with an Indian tribe, that it should be obligatory as soon as it should be ratified by the President and Senate, will postpone its taking effect until signed by the President, though it had been previously ratified by the Senate and accepted by the Indians.[7]

§ 88. Postponing operation until approval of Congress.—Where an amendment is added to a treaty, by the Senate, declaring that it shall not take effect until approved by Congress, the date when the treaty will become effective will be fixed, not by a provision contained in it that it shall become operative within a certain time after exchange of ratifications, but will depend upon the passage of an act by Congress.[8]

The treaty with Cuba contained a clause that: "The present convention shall be ratified by the appropriate authorities of the respective countries, and the ratifications shall be exchanged at Washington, District of Columbia, United States of America, as soon as may be before the thirty-first day of January, 1903, *and the convention shall go into effect on the tenth day after the exchange of ratifications*, and shall continue in force for the term of five (5) years from the date of going into effect, and from year to year thereafter, until the expiration of one year from the day when either of the contracting parties shall give notice

[4] Davis v. Concordia, 9 How. (50 U. S.) 280, 13 L. ed. 138.

[5] In re Metzger, Fed. Cas. No. 9511.

[6] Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; United States v. Percheman, 7 Pet. 51, 8 L. ed. 604; Garcia v. Lee, 12 Pet. 511, 9 L. ed. 1176; Haver v. Yaker, 9 Wall. 32, 19 L. ed. 571; Turner v. Baptist Union, 5 McLean, 344 Fed. Cas. No. 14,250; Bartram v. Robertson, 15 Fed. 212, 21 Blatchf. 211.

[7] Shepard v. Northwestern Life Ins. Co., 40 Fed. 341.

[8] United States v. American Sugar Refining Co., 202 U. S. 563, 26 Sup. Ct. Rep. 717, 50 L. ed. 1149.

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to the other of its intention to terminate the same."[9] The Senate added this amendment: "This convention shall not take effect until the same shall have been approved by the Congress." Ratifications were exchanged on March 31, 1903, at which time Congress was not in session, but Congress was convened in special session November 9, 1903, and on December 17, 1903, passed an act to carry into effect the convention, which provided in section 1: "That whenever the President of the United States shall receive satisfactory evidence that the Republic of Cuba has made provision to give full effect to the articles of convention between the United States and the Republic of Cuba, signed on the eleventh day of December, in the year nineteen hundred and two, he is hereby authorized to issue his proclamation, declaring that he has received such evidence, *and, thereupon, on the tenth day after exchange of ratifications of such convention* between the United States and the Republic of Cuba, *and so long as the said convention shall remain in force,* all articles of merchandise being the product of the soil or industry of the Republic of Cuba, which *are now* imported into the United States free of duty, and all other articles of merchandise being the product of the soil or industry of the Republic of Cuba imported into the United States *shall be admitted* at a reduction of twenty per centum of the rates of duty thereon, as provided by the tariff act of the United States approved July twenty-fourth, eighteen hundred and ninety-seven, or as may be provided by any tariff law of the United States subsequently enacted. The rates of duty herein granted by the United States to the Republic of Cuba, are and shall continue, during the term of said convention, preferential in respect to all like imports from other countries; Provided, That, while said convention is in force, no sugar imported from the Republic of Cuba, shall be admitted into the United States at a reduction of duty greater than twenty per centum of the rates of duty thereon, as provided by the tariff act of the United States approved July twenty-fourth, eighteen hundred and ninety-seven, and no sugar the product of any other foreign country shall be admitted by treaty or convention into the United States while this convention is in force at a lower rate of duty than that provided by the tariff act of the United States approved July twenty-fourth, eighteen hundred and ninety-seven; And provided, fur-

[9] 33 Stats. at Large, 2136.

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ther, that nothing herein contained shall be held or construed as an admission on the part of the House of Representatives that customs duties can be changed otherwise than by an act of Congress originating in said House."

The President issued his proclamation on the day of the passage of this act, setting forth the treaty and the act of Congress, and declaring that he had received satisfactory evidence that the Republic of Cuba had made provision to give full effect to the articles of the convention, and declaring and proclaiming "the said convention as amended by the Senate of the United States to be in effect *on the tenth day from the date of this, my proclamation.*" [10]

§ 89. **Question before the court.**—The question before the court was whether a certain quantity of sugar imported between the 12th of June and the 28th of September, 1903, should be charged with full duties under the tariff act, or was entitled to a reduction of twenty per cent prescribed by that act, under the treaty and the act of Congress. The solution of the question depended upon the date when the treaty became effective. The court held that the reduction of twenty per cent in the duties imposed by the tariff act did not become operative until December 27, 1903, the date proclaimed by the President of the United States and the President of the Cuban republic for the commencement of the operation of the treaty.[11]

§ 90. **Reasoning of the court.**—In the lower court the view taken was that owing to the language of the treaty as to the time at which it should take effect, it was intended to have a retroactive operation, and was intended to relate to merchandise imported from Cuba ten days or more after the exchange of ratifications.[12] The supreme court of the United States said, however, that between the treaty and the amendment there was an emphatic difference. "The date at which the instrument should go into effect was changed. It cannot be said that the treaty

[10] 33 Stats. at Large, 2136.

[11] United States v. American Sugar Refining Co., 202 U. S. 563, 26 Sup. Ct. Rep. 717, 50 L. ed. 1149; Frankl'n Sugar Refining Co. v. United States, 202 U. S. 580, 26 Sup. Ct. Rep. 720, 50 L. ed. 1153.

[12] American Sugar Refining Co. v. United States, 136 Fed. 508.

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provision related to time and the amendment to sanction merely, and adopted the time of the treaty. To do this would be to interpret the words of the treaty one way and the same words in the amendment another way. We start, then, with the proposition that not the treaty, but the act of Congress, was to fix the date that the treaty should take effect. What date Congress fixed is the question to be considered. It was certainly competent for Congress (with the consent of Cuba) to have given the treaty retrospective, immediate, or prospective operation." The court said that there was a presumption against retrospective operation, and that words in a statute should not be so construed unless the intention of the legislature cannot be otherwise satisfied.[13] The court admitted that there were words in the act of Congress which, if not in themselves, yet in connection with events, might be said to look to a retrospective operation. The words of the act of Congress refer manifestly to an event to occur, which had, apparently, already occurred, and it was contended that upon the happening of such event, the treaty by its own terms and by the act of Congress took effect. To this contention the government replied that as Congress was not in session at the time, it was ignorant of the fact that ratifications had been exchanged, and framed its legislation on the view that some further action was required on the part of Cuba. The court on this subject said: "If we may not accept the explanation of Congress' ignorance, it is not unreasonable to suppose that Congress considered it was still open to Cuba to accept or reject the treaty, and to make sure of her acceptance before the treaty should go into effect in the United States. This view satisfies completely the text of the act. We cannot suppose that, if Congress intended to give retrospective operation to the act, it would have used the words that expressed the contrary. The day at which the treaty should operate was important, and would necessarily be ever present in mind, and it was of easy expression. Future time and past time are directly opposite, and by no inadvertence or intention can we believe or suppose that Congress, having in mind and purpose the distinction between the past and the future, should use language that expressed the one while it meant to provide for the other."

[13] Citing United States v. Burr, 159 U. S. 78, 15 Sup. Ct. Rep. 1002, 40 L. ed. 82.

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The court also adverted to what it declared was another important fact: "The treaty was a reciprocal arrangement and intended to go into effect coincidently in the United States and Cuba. The two nations provided for this. On the day the President approved the act of Congress, he issued his proclamation declaring that the treaty should go into effect on the 27th day of December. On the 17th day of December, the President of Cuba also issued his proclamation, stating that Congress had approved the treaty in accordance with the requirements of article II, and declaring that the treaty should take effect in Cuba on the day named on the proclamation of the President of the United States—December 27, 1903. This coincident operation is of the very essence of the convention. It would indeed be anomalous if a treaty which provided for reciprocal concessions should be in operation in one nation eight months before it was in operation in the other. And this is not adequately answered as appellee answers it, by saying that the President of Cuba and the President of the United States were both mistaken as to the date of the operation of the treaty, and their mistake could not affect the rights of importers. Certainly not if a mistake could be conceded. But the action of the Presidents is proof against the existence of mistakes. It shows the understanding of the Executives of the two countries, and affords confirmation of the view that Congress contemplated action subsequent to its legislation to put the treaty into effect." [14]

§ 91. Effect on individual rights.—But where individual rights are concerned, the rule is that a treaty does not take effect until the exchange of ratifications.[15] Upon the cession by Spain of the island of Porto Rico, the Constitution at once extended over it, conferring among other rights that of trial by jury in criminal prosecutions. But as to private rights, the treaty became effective only from the time of the exchange of ratifications, and, therefore, a military tribunal of the United States, established

[14] United States v. American Sugar Refining Co., 202 U. S. 563, 26 Sup. Ct. Rep. 717, 50 L. ed. 1149.

[15] Davis' Notes, U. S. Treaty, Vol. 1776-1887, 1228, citing Davis v. Concordia, 9 How. 280, 13 L. ed. 138; Lessee of Hylton v. Brown, 1 Wash. C. C. 343, Fed. Cas. No. 6982; Haver v. Yaker, 9 Wall. 32, 19 L. ed. 571; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547. See, also, Bush v. United States, 29 Ct. of Cl. 144.

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during the occupancy of the island by the military forces of the United States as conquered territory, had jurisdiction in March, 1899, to try offenses.[16] As to the collection of duties on merchandise, a treaty takes effect from the exchange of ratifications.[17]

§ 92. **Retroactive effect.**—Where rights of succession to realty are given to the subjects of a foreign sovereign by a treaty, it is not retroactive so as to affect the succession of a person dying before the treaty.[18] But conventions of extradition, where no express limitation is expressed, apply to offenses committed prior to the conclusion of such conventions.[19]

The constitutional provision against *ex post facto* laws is not applicable.[20] It may be stated as a rule that as to individual rights, the ratification of a treaty must be deemed its date.[21]

§ 93. **Authority of courts.**—Whether a treaty was properly executed or whether it was obtained by undue influence are not matters into which courts can inquire.[22] Courts have no authority to examine or decide whether the person ratifying a treaty on behalf of a foreign nation had the authority to enter into the stipulations contained in the treaty. The President and Senate make this inquiry when entering into the treaty.[23] Thus it was admitted that certain grants of land were annulled and declared void by the ratification, by the King of Spain, of the treaty by which Florida was ceded to the United States. But whether, according to the constitution of Spain, the king had power to annul these grants is a political, and not a judicial, question, and it was decided when the treaty was made and ratified.[24]

The court will refuse to pass upon the power of Indian tribes to enter into a treaty.[25] Where a treaty with an Indian tribe

[16] Ex parte Ortz, 100 Fed. 955.

[17] Dooley v. United States, 182 U. S. 222, 21 Sup. Ct. Rep. 762, 45 L. ed. 1074.

[18] Prevost v. Greenaux, 19 How. 1, 15 L. ed. 572.

[19] 1 Moore on Extradition, 99.

[20] In re De Giacomo, 12 Blatchf. 391, Fed. Cas. No. 3747.

[21] Yeaker's Heirs v. Yeaker, 4 Met. (61 Ky.), 33, 81 Am. Dec. 530.

[22] Leighton v. United States, 29 Ct. of Cl. 288.

[23] Doe ex dem. Clark v. Braden, 16 How. (57 U. S.) 635, 14 L. ed. 1090.

[24] Doe ex dem. Clark v. Braden, 16 How. (57 U. S.) 635, 14 L. ed. 1090.

[25] In re Race Horse, 70 Fed. 607.

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prescribes a rule by which private rights can be determined, courts will give effect to such rule.[26]

§ 94. Construction of treaty province of courts.—But it is the peculiar province of the courts to construe a treaty, and except in purely political cases, Congress possesses no constitutional power to settle rights arising from a treaty or to affect titles already granted by the treaty itself.[27]

After the passage of a resolution by the Senate that it has approved a treaty with Indians and the issuance by the President of a proclamation accepting, ratifying and confirming the treaty, the courts cannot go into the question as to whether the treaty was in fact approved by the Indians.[28]

If the United States, as a sovereign power, chooses to disregard the provisions of a treaty, the supreme court of the United States has no power to set itself up as an instrumentality for enforcing its provisions.[29] Where it was contended that an act of Congress was in conflict with the treaty with Mexico, Mr. Justice Miller said that this was "a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard."[30]

[26] Leighton v. United States, 29 Ct. of Cl. 288.

[27] Jones v. Meehan, 175 U. S. 1, 32, 20 Sup. Ct. Rep. 1, 44 L. ed. 49; Wilson v. Wall, 6 Wall. 83, 18 L. ed. 727; Reichart v. Felps, 6 Wall. 160, 18 L. ed. 849; Smith v. Stevens, 10 Wall. 321, 19 L. ed. 933; Holden v. Joy, 17 Wall. 211, 21 L. ed. 523.

[28] New York Indians v. United States, 30 Ct. of Cl. 413.

[29] Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. Rep. 525, 32 L. ed. 928.

[30] Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. Rep. 525, 32 L. ed. 928. See, also, The Cherokee Tobacco, 78 U. S. (11 Wall.) 616, 20 L. ed. 227; Taylor v. Morton, 2 Curt. 454, Fed. Cas. No. 13,799; Head Money Cases, 112 U. S. 580, 5 Sup. Ct. Rep. 247, 28 L. ed. 798; Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. Rep. 456, 31 L. ed. 386.

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§ 95. Termination of treaties.—A treaty may be modified or abrogated by mutual consent; when terms upon which its continuance is based cease to exist; by refusal of either party to perform a material stipulation; by election to withdraw by a party having the option to elect; by the physical or moral impossibility of performance; by the discontinuance of a state of things forming the basis of the treaty or one of its implied conditions.[31]

§ 96. Question a political one.—After Prussia became incorporated into the German Empire the treaty entered into between the United States and Prussia had been repeatedly recognized by both governments as still in force. Upon *habeas corpus* proceedings to prevent the extradition of a fugitive from justice who is held under extradition proceedings under that treaty, the existence of the treaty cannot be questioned. The question is a political one, and not within the power of the judicial department to determine, and whatever determination may be made by the political department must be accepted by the courts.[32] Nor is it necessary to consider whether extinguished treaties can be renewed by tacit consent, because in determining whether a treaty has ever been terminated the action taken by the government in respect to it must be regarded of controlling importance.[33]

In a case in which the continuance of the extradition treaty with Bavaria was questioned, Mr. Justice Blatchford said: "It is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being in such case not absolutely void, but voidable, at the election of the

[31] Wharton Int. L. D. 11, 58; Wharton Com. Am. Law, sec. 161.

[32] Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. Rep. 484, 46 L. ed. 534.

[33] Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. Rep. 484, 46 L. ed. 534. Mr. Chief Justice Fuller said: "It is out of the question that a citizen of one of the German states charged with being a fugitive from its justice should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the empire as to its powers and the powers of its members, and especially as the executive department of our government has accepted these conclusions and proceeded accordingly."

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injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture."[34]

§ 97. **Violation of treaty by one nation.**—If one of the contracting powers continues to violate a provision of a treaty, the other is justified in regarding the provision as suspended temporarily.[35] Mr. Madison said that, as he understood the Constitution, treaties are supreme over the laws and constitutions of the particular states, and like a subsequent law of the United States over pre-existing laws of the United States, if the treaty be made within the prerogative of making treaties, which he said he had no doubt had certain limits, but, he added, "that the contracting powers can annul the treaty, cannot, I presume, be questioned, the same authority, precisely, being exercised in annulling as in making a treaty. That a breach on one side (even of a single article, each being considered as a condition of every other article) discharges the other, is as little questionable; but with this reservation, that the other side is at liberty to take advantage or not of the breach, as dissolving the treaty. Hence I infer that the treaty with Great Britain, which has not been annulled by mutual consent, must be regarded as in full force and effect by all on whom its execution in the United States depends, until it shall be declared, by the party to whom a right has accrued by the breach of the other party to declare, that advantage is taken of the breach, and the treaty is annulled accordingly. In case it should be advisable to take advantage of the adverse breach, a question may perhaps be started, whether the power vested by the Constitution with respect to treaties in the President and Senate makes them the competent judges, or whether, as the treaty is a law the whole legislature are to judge of its annulment, or whether, in case the President and Senate be competent in ordinary treaties, the legislative authority be requisite to annul a *treaty of peace*, as being equivalent to a declaration of war, to which that authority alone, by our Constitution, is competent."[36]

[34] In re Thomas, 12 Blatchf. 370, Fed. Cas. No. 13,887. See, also, Doe v. Braden, 16 How. (U. S.) 635, 14 L. ed. 1090; Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415.

[35] Mr. Bayard, Secretary of State, to Mr. Fairchild, Secretary of the Treasury, February 6, 1888, For. Rel. 1888, I, 124.

[36] 1 Madison's Works, 523, 524.

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§ 98. Termination of treaties by notice.—A provision is sometimes inserted in a treaty that it may be terminated by notice given by one of the parties to the other. In 1798 a statute was passed by Congress reciting that the treaty between the United States and France had been repeatedly violated on the part of the French government, and declaring the United States were exonerated in consequence from the stipulation of the treaty.[37] After the passage of this act a French vessel captured as lawful prize, on board of an American ship, a cargo of goods owned by a subject of Great Britain, but insured by citizens of the United States. The United States received an indemnity from France for claims of spoliation, and an assignee of the captured cargo attempted to recover the value of the goods from the United States out of this indemnity. It was held that after the treaties between France and the United States had become abrogated, the goods belonging to an enemy of France found on an American vessel were not entitled to protection, and that as no right existed in the United States to demand indemnity from France by reason of such seizure, the claimant could not obtain satisfaction out of the general indemnity funds which France paid to the United States.[38]

§ 99. Subject matter covered by later treaty.—Where a later treaty covers the whole subject matter of a former treaty, it will repeal by implication the former treaty.[39] Where a revocation of a treaty is made upon the assumption and declaration that all its provisions were incorporated into the later treaty, the revocation must be confined to those provisions which were so incorporated, and the treaty will continue to be in force as to the provisions not incorporated.[40]

[37] 1 Stats. 578.

[38] The William, 23 Ct. of Cl. 201.

[39] La Republique Francaise v. Schultz, 57 Fed. 37. See, also, In re Strobel's Estate, 39 N. Y. Supp. 169, 5 App. Div. 621, as to later treaty abrogating treaty with Würtemberg.

[40] Ross v. McIntyre, 140 U. S. 453, 11 Sup. Ct. Rep. 897, 35 L. ed. 581.

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CHAPTER VI.

FEDERAL QUESTION UNDER TREATY.

§ 100. Federal question.
§ 101. Fraudulent claim.
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§ 114. Manner in which cause of action arises to be stated.

§ 100. Federal question.—Under the Constitution, the judicial power of the United States extends to all cases in law or equity arising under treaties made, or which shall be made, under their authority.[1] The supreme court of the United States has appellate jurisdiction over a judgment or decree in any suit in the highest court of a state in which the validity of a treaty is drawn in question, and if the decision is against its validity, or the title specially asserted by either party to the suit, under the treaty, the court is not confined to the abstract construction of the treaty, but has jurisdiction to determine that title and decide as to its legal validity.[2] No federal question, however, is presented where the highest court of a state adjudicated that certain proceedings

[1] Const., art. III, sec. 2, cl. 2.

[2] Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. ed. 97. "How, indeed, can it be possible," said Mr. Justice Story in the case just cited, "to decree whether a title be within the protection of a treaty until it is ascertained what the title is and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide that the title was bad, and, therefore, not protected by the treaty, must not this court have the power to decide the title to be good, and, therefore, protected by the treaty? Is not the treaty, in both instances, equally construed, and the title of the party, in reference to the treaty, equally ascertained and decided?"

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before a Mexican tribunal, prior to the treaty of Guadalupe Hidalgo, were not sufficient to affect the partition of a tract of land previously granted by the Mexican government, and where the grant was confirmed under the act of Congress. That treaty protected all existing rights within the ceded territory, "but it neither created the rights nor defined them. Their existence was not made to depend on the Constitution, laws, or treaties of the United States. There was nothing done but to provide that if they did in fact exist under the Mexican law, or by reason of the action of Mexican authorities, they should be protected. Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunals. Any court, whether state or national, having jurisdiction of the parties, and of the subject matter of the action, was free to act in the premises."[3]

§ 101. **Fraudulent claim.**—No protection was extended by the treaty to a fraudulent claim, and proceedings under the statute to determine any such question between private persons, none of whom claimed under the United States by title subsequent, but who founded their claims upon patents based upon Mexican grants. Like the ordinary case of a contest in respect to a forged or fraudulent deed, the state courts were open for the adjudication between individuals of the priority or validity of conflicting titles under different grants from the same antecedent source, and whether one of the two grants was forged or obtained by fraud did not raise an issue involving the denial of a right or title set up under the treaty or the statute.[4]

§ 102. **Both parties claiming under grant.**—A suit does not arise under that treaty so as to confer jurisdiction on a federal court, when both parties claim under Mexican grants, confirmed and patented to the United States, conformably to the provisions of the treaty protecting all existing property rights.[5]

[3] Phillips v. Morina City Land & W. Assn., 124 U. S. 605, 610, 8 Sup. Ct. Rep. 657, 31 L. ed. 588, per Mr. Chief Justice Waite. In Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. ed. 97, the plaintiff claimed under a treaty, and the court decided against the title thus asserted.

[4] Lynch v. De Bernal, 76 U. S. (9 Wall.) 315, 19 L. ed. 714.

[5] Crystal Springs Land & Water Co. v. City of Los Angeles, 76 Fed. 148; Crystal Springs Land & W. Co. v. Los Angeles, 82 Fed. 117.

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§ 103. Treaty right must be set up.—To enable the supreme court of the United States to entertain jurisdiction to review a judgment of a state court, denying a title, right, privilege or immunity claimed under a treaty, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time, and in the proper manner, and that the decision was against the right so asserted. If the decision of the state court rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, the supreme court of the United States will dismiss a writ of error without considering any federal question that may have been presented also.[6] Thus, the fact that the judgment of the state court was based upon the proposition that the grant under which the plaintiff in error claimed title was simulated, is a sufficient reason for sustaining the judgment, and it cannot be said that a federal question is involved.[7] To quote the language of Mr. Justice Bradley: "The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction."[8] Or, as it has been expressed in other words, that where an action is pending in a state court, and "two grounds

[6] California Powder Works v. Davis, 151 U. S. 393, 14 Sup. Ct. Rep. 352, 38 L. ed. 206; Eustis v. Bolle, 150 U. S. 361, 14 Sup. Ct. Rep. 131, 37 L. ed. 1111.

[7] California Powder Works v. Davis, 151 U. S. 395, 14 Sup. Ct. Rep. 352, 38 L. ed. 206.

[8] In Klinger v. Missouri, 13 Wall. (80 U. S.) 257, 20 L. ed. 635.

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of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a Federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the Federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defense which does not involve a Federal question is so palpably unfounded that it cannot be presumed to have been entertained by the state court."[9]

§ 104. When to be set up.—The right claimed as arising from a treaty must be claimed or set up prior to the petition for a writ of error, as this forms no part of the record of the lower court;[10] and the state court must have actually decided the federal question, or the judgment must necessarily involve a decision of it;[11] for the federal question will not be considered if the decision of the state court on some other than a federal ground is sufficiently comprehensive.[12] The supreme court is without jurisdiction unless it appear in the record that a federal question was raised and decided in the state court.[13]

[9] Johnson v. Risk, 137 U. S. 300, 11 Sup. Ct. Rep. 111, 34 L. ed. 683.

[10] Clark v. Commonwealth of Pennsylvania, 128 U. S. 395, 9 Sup. Ct. Rep. 113, 32 L. ed. 487.

[11] Fowler v. Lamson, 164 U. S. 255, 17 Sup. Ct. Rep. 113, 41 L. ed. 425.

[12] Chappell Chemical Co. v. Sulphur Mines Co., 172 U. S. 471, 19 Sup. Ct. Rep. 267, 43 L. ed. 517; Dower v. Richards, 151 U. S. 666, 14 Sup. Ct. Rep. 455, 38 L. ed. 308; Missouri Pac. Ry. v. Fitzgerald, 160 U. S. 576, 16 Sup. Ct. Rep. 393, 40 L. ed. 540.

[13] Fowler v. Lamson, 164 U. S. 225, 17 Sup. Ct. Rep. 113, 41 L. ed. 425. Said the court: "It will be seen that there are no pleadings on the record; no evidence is returned; no exceptions to any decision of the court are to be found; no request to the court to find upon any Federal question; and no finding upon any such question. Thus there is an entire absence in this whole record of any fact showing that the supreme court of Illinois or either of the lower courts decided any Federal question whatever. The assignment of errors alleged to have been made by the Illinois supreme court is unavailable for the purpose of showing any Federal question decided, where the record itself does not show that any such question was passed upon by the state court. Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556-575, 16 Sup. Ct. Rep. 393, 40 L. ed. 536-540. Where a case is brought to this court on error or appeal from a judgment of a state court unless it appear in the record that a Federal question was raised in the state court before the entry of final judgment in the case, this court is without jurisdiction. Simmerman

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§ 105. Claim under treaty not a frivolous question.—A writ of error will not be dismissed unless the federal question presented is frivolous. An action in ejectment was brought by the city of Mobile in a state court to recover a portion of the shore and bed of the Mobile river in the city of Mobile between high-water mark and the channel line. The defendant offered in evidence certain documents, legislative and executive, of the Congress of the United States, in relation to the public lands, from the first session of the first Congress to the first session of the twenty-third Congress, and especially that relating to the claim of one Bernoudy, who claimed under a Spanish grant made in 1792, together with evidence of the report of the land commissioner, in favor of his claim and a patent of the United States to the assignees of Bernoudy, reciting that the claim of Bernoudy was affirmed, had been surveyed, and was by such title granted to the assignees. Defendant also offered an unbroken series of deeds from these assignees to it as well as proof of adverse possession of the lands under color of right. The lower court excluded the evidence, and its action was affirmed by the supreme court of the state.[14] The case was taken to the supreme court of the United States by a writ of error, and a motion was made in that court to dismiss the writ for the want of a federal question. But the court decided that inasmuch as the defendant's title depended upon a Spanish grant claimed to have been perfected under a treaty, and a patent of the United States in alleged confirmation of such claim, the motion could not be sustained, unless upon the theory that the federal questions presented were frivolous and unde-

v. Nebraska, 116 U. S. 54, 6 Sup. Ct. Rep. 333, 29 L. ed. 535. It has also been frequently decided that, to give this court jurisdiction on writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Eustis v. Bolles, 150 U. S. 361, 14 Sup. Ct. Rep. 131, 37 L. ed. 1111; California Powder Works v. Davis, 151 U. S. 389-393, 14 Sup. Ct. Rep. 352, 38 L. ed. 206, 207; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556-576, 16 Sup. Ct. Rep. 393, 40 L. ed. 536-540."

[14] Mobile Transp. Co. v. City of Mobile, 128 Ala. 335, 86 Am. St. Rep. 143, 30 South. 645, 64 L. R. A. 333.

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serving of further notice, and the court was of the opinion that they could not be so considered.[15]

§ 106. Title in third person under treaty.—The supreme court of the United States has no jurisdiction in actions of ejectment where the defence is an outstanding title alleged to be protected by treaty. At an early day the court declared that the words, "a case arising under a treaty," in the judiciary act must be restrained by the Constitution. In an action of ejectment between two citizens of Maryland the defendant set up an outstanding title in a British subject, which he claimed was protected by the treaty, and therefore the title was not in the plaintiff. The highest court of Maryland decided against this claim, but it was held that it was not a case in which a writ of error would lie to the supreme court of the United States.[16] The principle announced in the case cited in the note has been followed in a number of others.[17] While the court has jurisdiction to determine conflicting rights under an Indian treaty, it cannot go behind the treaty to decide matters settled by the treaty.[18]

§ 107. Outstanding title in assignee in bankruptcy.—So, on similar grounds, jurisdiction will not be entertained when an outstanding title in a federal assignee in bankruptcy who is not a party to the suit is set up as a defense against the officers of a state court.[19] It was said by Mr. Chief Justice Taney in a case in which the defendant set up an outstanding title in a third person under an Indian treaty: "It is true, the title set up in this case was claimed under a treaty; but, to give jurisdiction to this court, the party must claim the right for himself, and not for a third person in whose title he has no interest."[20]

[15] Mobile Transportation Co. v. Mobile, 187 U. S. 479, 23 Sup. Ct. Rep. 170, 47 L. ed. 266.

[16] Owings v. Norwood's Lessee, 5 Cranch, 344, 3 L. ed. 120.

[17] Fisher v. Cockerell, 5 Pet. 257, 8 L. ed. 117; Henderson v. Tennessee, 10 How. 323, 13 L. ed. 439; Verden v. Coleman, 1 Black, 474, 17 L. ed. 162.

[18] United States v. Old Settlers, 148 U. S. 469, 13 Sup. Ct. Rep. 667, 37 L. ed. 525.

[19] Long v. Converse, 91 U. S. 113, 23 L. ed. 233. And see other cases by analogy, Connor v. Scott, 4 Dill. 246, Fed. Cas. No. 3119; Giles v. Little, 134 U. S. 650, 10 Sup. Ct. Rep. 623, 33 L. ed. 1064; Miller v. Lancaster Bank, 106 U. S. 544, 1 Sup. Ct. Rep. 537, 27 L. ed. 290; Wynne v. Morris, 20 How. 5, 15 L. ed. 801.

[20] Henderson v. State of Tennessee, 10 How. (U. S.) 311, 13 L. ed. 434.

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§ 108. Construction of state statutes.—Where the issue affecting the title to land is whether a state statute of confiscation accomplished a complete confiscation within the meaning of a treaty, the construction of the treaty is sufficiently involved for the purposes of federal jurisdiction.[21]

Under the treaty between the United States and Mexico providing for the adjustment of claims of American citizens against Mexico, a sum of money was awarded to be paid to the members of a company who had subscribed money, to fit out an expedition against Mexico. Two parties claimed the proceeds of one of the shares of the company, one as being the second permanent trustee of the insolvent owner of the share, and the other as being the assignee of the first permanent trustee. It was decided by the court of appeals of Maryland that the second permanent trustee did not take the claim under the insolvent laws of that state, and this decision was held by the supreme court of the United States not to be reviewable.[22]

[21] Smith v. State of Maryland, 6 Cranch, 286, 3 L. ed. 225.

[22] Williams, Trustee, v. Oliver, 12 How. 124, 13 L. ed. 921; Gill v. Oliver's Executors, 11 How. 529, 13 L. ed. 808. The court said, per Mr. Justice Nelson: "The decision of the court below, therefore, not involving the validity of the treaty, or award of the commissioners, or lawfulness or character of the fund, but simply the right and title to the respective shares claimed on it after the fund had been paid over by the government, and brought into court for distribution according to the agreement of all concerned, and which distribution depended upon the laws of the state, a majority of the court, taking this view of the case, held, that there was a want of jurisdiction, and dismissed the writ of error, and that the decision, whether right or wrong, could not be the subject of review under the 25th section of the judiciary act, as it involved no question, either directly or by necessary intendment, arising upon the treaty or award, or connected with the validity of either, and if this court were right in the view thus taken of the case, there can be no doubt of the correctness of the conclusion arrived at." The court referred to some cases sustaining this principle but said: "It is not intended, nor to be understood from these cases, that the question, thus material to the decision arrived at, must be confined exclusively and specially to the conclusion of the treaty, act of Congress, etc., in order to give the jurisdiction, as this would be too narrow a view of it. Points may arise growing out of and connected with the general question, and so blended with it as not to be separated, and therefore falling equally within the decision contemplated by the 25th section. The cases of Smith v. The State of Maryland, 6 Cranch, 286, 3 L. ed. 225, and Martin v. Hunter's Lessee, 1 Wheat. 304, 355, 4 L. ed. 97, afford illustrations of this principle."

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§ 109. **Protection of inhabitants.**—A federal question is presented by a claim that a person who has settled within the territory of an Indian nation is on account of treaties made between the Indians and the United States entitled to reside there free from any legislative interference by the states.[23]

When Louisiana entered the Union its inhabitants were admitted to the enjoyment of all the rights, advantages and immunities of the citizens of the United States. Hence the supreme court of the United States will not review a decision of the supreme court of Louisiana, on the ground that it was adverse to a right secured by a stipulation in the treaty of cession of Louisiana for the protection of the inhabitants, in the free enjoyment of their liberty, property or religion, because the operation of this stipulation ceased on Louisiana's admission to the Union.[24] A federal question is raised by the question whether proceedings in extradition were violative of and forbidden by the treaty from which extradition was secured.[25]

§ 110. **Award under claims commission.**—A convention was concluded between the United States and France in January, 1880,[26] by which it was stipulated that "all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of France, arising out of acts committed against the persons or property of citizens of the United States, not in the service of the enemies of France or voluntarily giving aid and comfort to the same, by the French civil or military authorities, upon the high seas or within the territory of France, its colonies and dependencies, during the late war between France and Mexico, or during the war between France and Germany, and the subsequent civil disturbances known as the 'Insurrection of the Commune,' and, on the other hand, all claims on the part of corporations, companies or private individuals, citizens of France, arising out of acts committed against the persons or property of citizens of France not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same, by the civil or military authorities of the

[23] Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483.

[24] New Orleans v. De Armas, 9 Pet. 224, 9 L. ed. 109.

[25] Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. Rep. 225, 30 L. ed. 421.

[26] 12 Stats. 673.

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government of the United States, upon the high seas or within the territorial jurisdiction of the United States during the period comprised between the thirteenth day of April, 1861, and the twentieth day of August, 1866," shall be referred to three commissioners, one of whom shall be named by the President of the United States, and one by the French government, and the third by His Majesty, the Emperor of Brazil. These commissioners were obliged to examine and decide upon all claims of this character presented to them. They allowed a claim to an executor, for injuries done to his testator's property; and on distribution a contest arose among the heirs, the plaintiffs in error, claiming that they were entitled to the whole award, because they were the only heirs and legatees who were French citizens at the time the claim was presented and when the award was rendered; and that no award under the treaty could have been made in favor of the other heirs and legatees, as they were citizens of the United States at that time; and that no executor or person representing the succession of a person who was not a French citizen at the time the damage was suffered and award rendered could have any standing before the commission.

The lower state court sustained the position of plaintiffs in error, and decreed that the entire fund should go to them, one-half to each. The supreme court of Louisiana reversed this decree, and gave judgment to the effect that the entire fund in the possession of the executor should be distributed proportionally among all the heirs and legatees, both French and American citizens. As the decision of the supreme court of Louisiana was thus against the right asserted by the French citizens as heirs, founded upon this treaty, the supreme court of the United States held that a question was presented within the jurisdiction of the court.[27]

§ 111. Diverse citizenship sole ground of jurisdiction at commencement of suit.—If, when a suit is commenced in a circuit court of the United States, the jurisdiction is placed, at the commencement of the suit, solely upon the ground of diverse citizenship, the judgment of the circuit court of appeals is final, although subsequently other questions are raised. The supreme court of the United States will, in such a case, dismiss a writ of

[27] Burthe v. Denis, 133 U. S. 514, 10 Sup. Ct. Rep. 335, 33 L. ed. 768.

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error, should the case be brought to that court, from the circuit court of appeals.[28]

§ 112. Treaty introduced as part of history of case.—A writ of error cannot be maintained where a treaty and award are introduced merely as a part of the history of the case. This does not involve in any way the validity of the treaty or its construction. An appeal or writ of error is allowed to the supreme court of the United States by the fifth section of the act of March 3, 1891, "in any case, in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question." But if it is not "suggested in the summons and statement of claim that the validity or construction of any treaty made under the authority of the United States was drawn in question, and no such question was decided either by the circuit court or the circuit court of appeals," and no question is raised by clear and necessary intendment directly touching the validity or construction of a treaty, a writ of error does not lie.[29]

§ 113. Definite issue as to claim of right.—The supreme court of the United States has declared that to authorize it to revise a judgment of the court below, a definite issue as to the claim of right under the Constitution must be clearly deducible from the record. "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when

[28] Borgmeyer v. Idler, 159 U. S. 408, 16 Sup. Ct. Rep. 34, 40 L. ed. 199; Colorado Central Consolidated Min. Co. v. Turck, 150 U. S. 138, 14 Sup. Ct. Rep. 35, 37 L. ed. 1030.

[29] Borgmeyer v. Idler, 159 U. S. 408, 16 Sup. Ct. Rep. 34, 40 L. ed. 199. In that case, in which treaties with the Republic of Venezuela were indirectly concerned, the court held that the ground of the judgment did not involve either the validity or construction of the treaty. See, also, Gill v. Oliver, 52 U. S. (11 How.) 529, 13 L. ed. 799; Williams v. Oliver, 53 U. S. (12 How.) 111, 13 L. ed. 915; Baltimore & P. R. Co. v. Hopkins, 130 U. S. 225, 9 Sup. Ct. Rep. 503, 32 L. ed. 913.

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the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason."[30]

§ 114. Manner in which cause of action arises to be stated.— If it is claimed that a cause of action depends upon the construction of a treaty, it must be stated in what way it arises. If a complaint in ejectment states a reliance on a certain article of a treaty and the fifth amendment of the Constitution, without declaring that any right, title, privilege or immunity is derived from either the Constitution or treaty, or indicating how the cause of action is founded upon either, and the court does not decide any question as to the application or construction of the Constitution or validity or construction of the treaty, but holds that the title of plaintiff failed on account of noncompliance with Spanish law, a writ of error will not lie from the supreme court of the United States.[31]

The right which it is claimed depends upon the treaty must be so set up or claimed as to require the lower court to pass on the question of validity or construction in disposing of the right asserted.[32]

[30] Mr. Chief Justice Fuller in Ansbro v. United States, 159 U. S. 698, 16 Sup. Ct. Rep. 189, 40 L. ed. 311. See, also, as sustaining the same proposition, Carey v. Houston & T. R. Co., 150 U. S. 170, 14 Sup. Ct. Rep. 63, 37 L. ed. 1041; Ex parte Lennon, 150 U. S. 395, 14 Sup. Ct. Rep. 123, 37 L. ed. 1121; Northern P. R. Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. Rep. 740, 36 L. ed. 506; Sayward v. Denny, 158 U. S. 180, 15 Sup. Ct. Rep. 777, 39 L. ed. 941. It is not competent for an assignment of errors to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to the supreme court of the United States under the fifth section of the act of March 3, 1891. Ansbro v. United States, 159 U. S. 698, 16 Sup. Ct. Rep. 189, 40 L. ed. 311.

[31] Muse v. Arlington Hotel Co., 168 U. S. 430, 18 Sup. Ct. Rep. 111, 42 L. ed. 531.

[32] Borgmeyer v. Idler, 159 U. S. 408, 16 Sup. Ct. Rep. 34, 40 L. ed. 199.

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CHAPTER VII.

CONSTRUCTION OF TREATIES AND EXTENT OF TREATY-MAKING POWER.

§ 115. Construction of treaties a judicial question.
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§ 115. Construction of treaties a judicial question.—If a treaty is silent as to the method of deciding questions of individual identity, they must be decided by the courts;[1] and where a treaty has the effect of creating or vesting individual rights, the meaning of the treaty as to such rights is to be ascertained by the same rules that would prevail in the case of private contracts.[2] When not repugnant to the language or purpose of the treaty, the construction of treaties adopted by the executive department should be followed by the courts.[3]

The treaty with Spain provides that "requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties," and that "it shall be *competent* for such representatives or such superior consular officers to ask and obtain a mandate or preliminary warrant of the arrest for the person whose surrender is sought," whereupon the judges shall have power, upon complaint made under oath, to issue a warrant for the apprehension of the person charged. This provision was held to be permissive only, and not obligatory, and that the demanding government might, at its option, proceed under section 5270 of the Revised Statutes without a preliminary mandate, or might demand it under the treaty provisions.[4] If, however, such a preliminary mandate is made prerequisite by the treaty, it is said that it should be set forth upon the face of the warrant.[5] It is not in-

[1] Stockton v. Williams, Walk. Ch. 120.

[2] Anderson v. Lewis, Freem. Ch. 178.

[3] Castro v. De Uriarte, 16 Fed. 93.

[4] Castro v. De Uriarte, 16 Fed. 93.

[5] Case of Farez, 7 Blatchf. 34, Fed. Cas. No. 4644. See as to the necessity of a preliminary mandate under certain treaties, Ex parte Kaine, 3 Blatchf. 1, Fed. Cas. No. 7597; Case of McDonnell, 11 Blatchf. 79, Fed. Cas. No. 8771; Case of Herman Thomas, 12 Blatchf. 370, Fed. Cas. No. 13,887.

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competent for Congress to pass laws in aid of a treaty, although a treaty may provide a mode for carrying out its provisions.[6]

By the treaty between Spain and the United States for the cession of the Floridas, no provision was made for a tribunal to decide upon the claims arising from injuries suffered by the operations of the American army in Florida, but the appointment of such a tribunal was left by the treaty to be made by the government of the United States.[7] A treaty is a contract as well as a law, and its construction should be such as to give full effect to all its parts.[8]

[6] Castro v. De Uriarte, 16 Fed. 93.

[7] Humphrey's Administrator v. United States, Dev. Ct. of Cl., secs. 678, 679.

[8] Goetze v. United States, 103 Fed. 72. "Treaties are subjected to the following general rules, which govern all contractual engagements:

"(1) There must be a concurrence of minds to one and the same thing.

"(2) The interpretation of obscure terms in a treaty is a matter of fact, as to which extrinsic evidence may be taken for the purpose of explaining objective obscurity.

"(3) Construction of treaties is a matter of law, to be governed by the same rules *mutatis mutandis*, as prevail in the construction of contracts and statutes.

"(4) As contracts may be modified and rescinded, so may treaties.

"(5) Immoral stipulations are void in treaties as they are in contracts.

"(6) 'Construction' is to be distinguished from 'interpretation.' 'Construction' gives the general sense of a treaty and is applied by rules of logic; 'interpretation' gives the meaning of particular terms, to be explained by local circumstances and by the idioms the framers of the treaty had in mind.

"(7) If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it.

"Treaties are distinguishable from contracts as follows:

"(1) Contracts (unless we regard marriage as a contract) are, in all cases, the subjects of a suit for debt or damages, or for a specific thing. But no such suit lies on breach of duty.

"(2) Contracts can only be vacated or rescinded by consent, or by the action of a court. But this is not necessarily the case with a treaty. There is no court which can be appealed to to dissolve it, and to declare it not to be any longer binding.

"(3) While a contract may be annulled on the ground of fraudulent influence exercised by strength over weakness, such a reason cannot be set up for regarding a treaty as a nullity, since all nations are supposed to stand on the same footing, with equal opportunities of detecting fraud, and there are many cases of finesse and false coloring or suppression of facts which would avoid contracts, which would not, *mutatis mutandis*, avoid a treaty. If *suppressio veri* abrogated treaties to the extent it abrogates contracts, few treaties would stand.

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§ 116. **Interpretation in spirit of good faith.**—A convention in a treaty binding both of the contracting powers, and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*. Such a construction should be adopted as will carry out the manifest purpose of the treaty.[9]

"As treaties are solemn engagements," said Mr. Justice Brown, "entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence."[10]

Chancellor Kent declares that treaties "are to receive a fair and liberal interpretation according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts."[11]

§ 117. **Intention to be carried out.**—As a corollary to the proposition that treaties should be construed in good faith, it results that the intention of the contracting parties should be effectuated. The treaty of 1832 with Russia authorizes the arrest and surrender of deserters from the ships of war of that

"(4) A treaty based upon a war accepts the results determined by the war, unless otherwise provided, while a contract does not necessarily assume the existing relations of the parties as a basis. 'The *uti possidetis* is the basis of every treaty of peace, unless it be otherwise agreed. Peace gives a final and perfect title to captures without condemnation, and, as it forbids all force, it destroys all hopes of recovery (of vessels) as much as if the vessel was carried *infra praesidia*, and condemned.'" Wharton's Int. Law Digest, sec. 133, II, 36, citing Kent's Commentaries, 173, as citing The Legal Tender, reported in Wheat. Dig. 302; The Schooner Sophie, 6 Rob. Adm. 138.

[9] Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. Rep. 195, 46 L. ed. 264.

[10] Tucker v. Alexandroff, 183 U. S. 437, 22 Sup. Ct. Rep. 195, 46 L. ed. 270.

[11] 1 Kent's Commentaries, 174.

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country. A vessel, launched, but still in process of construction under a contract to build a protected cruiser for the Russian government, is a Russian ship of war, within the purview of this provision, although by the terms of the contract the vessel may be rejected for deficiency in speed or excess in draught; and during her construction is at the risk of the contractors until actual acceptance, where it is also provided by the contract that the vessel shall be constantly subject to inspection by a board of Russian officers, and that all materials intended for the construction of the vessel when brought upon the premises of the contractors shall become the exclusive property of the foreign government.[12]

The presumption can never be indulged in that either state intends to provide the means of perpetrating or protecting frauds, and all the provisions of the treaty are to be construed as if they were intended to be applied to *bona fide* transactions.[13] A monopoly, void by the common law and the laws of the United States, but valid and patented by the law of Spain, will be considered private property within the protection of a treaty.[14]

§ 118. **Treaties in two languages.**—Treaties between the European powers were, until about the beginning of the eighteenth century, generally written in Latin. Since that time the custom has been for negotiators of countries which do not use the same language to prepare their treaties in the language of the signatory powers. The treaties of the United States with Russia form an exception to the general rule, as most of them have been written in French and English.[15]

Mr. Jay, Secretary of Foreign Affairs, on June 23, 1785, in transmitting to the President of Congress the consular convention with France concluded by Dr. Franklin, remarked that it appeared to be in the French language, but he observed that it seemed expedient to provide in the future that "every treaty

[12] Tucker v. Alexandroff, 183 U. S. 437, 22 Sup. Ct. Rep. 195, 46 L. ed. 270. A dissenting opinion was filed by Mr. Justice Gray, with whom Mr. Chief Justice Fuller and Justices Harlan and White concurred.

[13] United States v. Amistead, 15 Pet. 518, 10 L. ed. 826.

[14] O'Reilly De Camera v. Brooke, 135 Fed. 384.

[15] Mr. Fish, Secretary of State, to Miss Fraser, November 18, 1874, 105 MS. Dom. Let. 221.

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or convention which Congress may think proper to engage in should be formally executed in two languages, viz., the language of the United States and such other language as the party contracting with them may prefer."[16]

§ 119. **Instructions to diplomatic officers.**—Where English is not officially employed, the standing instructions of diplomatic officers of the United States are, as to the language of treaties: "(a) The texts in the two languages should be engrossed in parallel columns on the same page, if possible, or on opposite pages of the same sheet. Two separate copies in different languages are not advisable, although this expedient is sometimes resorted to in eastern countries. (b) In the copy of the treaty to be retained by the diplomatic representative for transmission to this government, the United States should be named first throughout both texts in all places where the alternative change may be made conveniently. Conversely, in both texts, throughout the copy the foreign government is to retain, it should be first named. (c) The language of the respective government should always occupy the left-hand place in the copy to be delivered to it. (d) The utmost care should be taken to insure the substantial equivalence of sense of the two texts, so as to exclude any erroneous effect due to translation. Though a strictly liberal translation is often harsh and sometimes impossible the absolute identity of the idea conveyed is indispensable. To this end, the punctuation of the two texts should also be attentively scrutinized and brought into substantial conformity."[17]

§ 120. **Both are originals.**—Where a treaty is executed in two different languages, both are considered as originals, and they must be construed together.[18]

Where a treaty between the United States and France is formulated both in the French and English languages, both being originals and intended to be identical, but in some particulars differing, such a construction will be given to them as will establish conformity between them, if possible, without doing vio-

[16] 1 MS. Am. Let. 311.

[17] Instructions to Diplomatic Officers of the United States, 1897, sec. 245, p. 100.

[18] United States v. Percheman, 7 Pet. 51, 8 L. ed. 604.

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lence to the terms of either.[19] The text in each language is considered as the equivalent of the other, and in a certain sense as explanatory of it, and by this interpretation the two texts have a common meaning. Both parties to the treaty stand on the same footing of equality, and the object sought to be attained by them has been accomplished.[20]

§ 121. **Construction favorable to execution of treaty.**—If a treaty admits of two constructions, preference will be given to that construction which is more favorable to its execution as designed by the parties.[21] It is like an ordinary contract or statute. Effect should be given to it, if possible. Courts, to enable them properly to construe a treaty, have a right to take into consideration the situation of the parties at the time of its execution, the property which constitutes the subject matter of the treaty, and the intention and purposes of the parties. The construction of a treaty which has been adopted and acted upon by all the parties to it will be taken as the true one, unless the parties were, by fraud or mistake, mutually led into this construction. If the mutual construction is in the face of the language used, and the rights of third parties have intervened, the language of the treaty will control.[22]

§ 122. **Vague and indefinite terms.**—If a treaty uses terms vague and indefinite, the nature of the thing to which they relate should be regarded for the purpose of ascertaining the intention. Such a construction should be given to these terms as will be in accordance with reason, and without injury to either will subserve the convenience of both the contracting parties.[23]

A preamble to a treaty does not, strictly speaking, constitute a part of the contract. But inasmuch as it is authenticated by the signatures of the contracting parties, its averments are to be treated as admitted truths.[24]

[19] In re Metzger, 1 Barb. 248.

[20] See note of Mr. Hay, Secretary of State, to Mr. Beaupré, No. 331, November 6, 1900, MS. Inst. Colombia, XIX, 123.

[21] United States v. Payne, 2 McCrary, 289, 8 Fed. 883.

[22] United States v. Payne, 2 McCrary, 289, 8 Fed. 883.

[23] Howard v. Ingersoll, 17 Ala. 780.

[24] Little v. Watson, 32 Me. 214.

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The treaty of 1783 with Great Britain contained a clause that there should be no confiscations or prosecutions for anything done during the war, but this provision, it was determined, could not be construed as excusing trespassers from liability for damage in civil suits brought to obtain judgments for damages.[25]

§ 123. **Whole treaty to be taken together.**—It was said by Mr. Livingston, Secretary of State: "There is no rule of construction better settled either in relation to covenants between individuals or treaties between nations than that the whole instrument containing the stipulation is to be taken together, and that all articles *in pari materia* should be considered as parts of the same stipulations."[26]

Reference cannot be made to the supplemental article of the treaty of 1800, by which the spoliation claims were released to France for the purpose of explaining the preceding articles, where such supplemental article was not appended to the treaty until ten months after the treaty was signed.[27]

§ 124. **Right of property in award.**—Although an award has been made pursuant to the terms of a treaty, it is competent for the government to negotiate for the retrial of any claim allowed, and to withhold the amount of such claim pending the negotiations. There is no right of property in the citizen of one country in the amount awarded to him that is not subject to the control of his government. The persons presenting claims are not parties to the treaty, and while between the two governments the awards are final, yet one country may treat with another for a re-

[25] Whitaker's Administrator v. English, 1 Bay, 15.

[26] Mr. Livingston, Secretary of State, to Baron Lederer, Consul-General of Austria, November 5, 1832, MS. Notes to For. Leg., V, 63.

[27] The Tom, 29 Ct. of Cl. 68; English v. United States, Id.; Boutwell v. United States, Id.; Atkinson v. United States, Id.; Hunt v. United States, Id. It was held that neither by the treaty of San Ildefonso of October 1, 1800, nor by that of Madrid of March 21, 1801, was the transfer by the King of Spain of the sovereignty of Louisiana to the French Republic complete. Spain continued to be the sovereign *de facto*, and the terms of these treaties do not necessarily import a change of sovereignty *de jure*, but only express the idea of a promise to cede on the performance of certain conditions precedent. Kenton v. Baroness of Pontalba, 1 Rob. 343.

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trial. If our government should discover that it had been made the instrument for imposition upon a friendly power, the highest principles of national good faith require it to make reparation as far as possible.[28]

Thus, the treaty between the United States and Mexico of 1868 provided for the submission to a commission to be created under a treaty of all claims of the United States, and that the award should be a full, perfect and final settlement as between the parties. While it was admitted that the awards were final and conclusive between the United States and Mexico until set aside by an agreement between the two governments, yet, it was held that the United States might negotiate with Mexico for a retrial of a particular award on account of the alleged fraudulent character of the proof offered to sustain the claim.[29] The view taken

[28] Frelinghuysen v. United States, 110 U. S. 63, 3 Sup. Ct. Rep. 462, 28 L. ed. 71.

[29] Frelinghuysen v. United States, 110 U. S. 63, 3 Sup. Ct. Rep. 462, 28 L. ed. 71. Mr. Chief Justice Waite, in delivering the opinion of the court, said:

"There is no doubt that the provisions of the Convention as to the conclusiveness of the awards are as strong as language can make them. The decision of the commissioners of the umpire, on each claim, is to be absolutely final and conclusive and without appeal. The President of the United States and the President of the Mexican Republic are to give full effect to such decisions, without any objection, evasion or delay whatsoever, and the result of the proceedings of the commission is to be considered 'a full, perfect and final settlement of every claim upon either Government, arising out of transactions prior to the exchange of the ratifications of the . . . . Convention.' But this is to be construed as language used in a compact of two nations 'for the adjustment of the claims of the citizens of either . . . . against the other,' entered into 'To increase the friendly feeling between' republics and so to strengthen the system and principles of republican government on the American continent. No nation treats with a citizen of another nation, except through his government. The treaty, when made, represents a compact between the governments, and each government holds the other responsible for everything done by their respective citizens under it. The citizens of the United States having claims against Mexico were not parties to this Convention. They induced the United States to assume the responsibility of seeking redress for injuries they claimed to have sustained by the conduct of Mexico, and as a means of obtaining such redress the Convention was entered into, by which not only claims of citizens of the United States against Mexico were to be adjusted and paid, but those of citizens of Mexico against the United States as well. By the terms of the compact, the individual claimants could not themselves submit their claims and

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by the court was that the citizens of the respective countries were not parties to the treaty, because a treaty is a compact between governments, and one government holds the other responsible for all acts performed by its citizens under the treaty.

proofs to the commission to be passed upon. Only such claims as were presented to the Governments respectively could be referred to the commission, and the commissioners were not allowed to investigate or decide on any evidence or information except such as was furnished by or on behalf of the Governments. After all the decisions were made and the business of the commission concluded, the total amount awarded to the citizens of one country was to be deducted from the amount awarded to the citizens of the other, and the balance only paid in money by the Government, in favor of whose citizens the smaller amount was awarded, and this payment was to be made, not to the citizens but to their Government. Thus, while the claims of the individual citizens were to be considered by the commission in determining amounts, the whole purpose of the Convention was to ascertain how much was due from one Government to the other on account of the demands of their respective citizens.

"As between the United States and Mexico the awards are final and conclusive until set aside by agreement between the two Governments or otherwise. Mexico cannot, under the terms of the Treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not now seek to do. Her payments have all been made promptly as they fell due, as far as these records show. What she asks is the consent of the United States to her release from liability under the Convention on account of the particular awards now in dispute, because of the alleged fraudulent character of the proof in support of the claims which the United States were induced by the claimants to furnish for the consideration of the commission.

"As to the right of the United States to treat with Mexico for a retrial, we entertain no doubt. Each Government, when it entered into the compact under which the awards were made, relied on the honor and good faith of the other for protection as far as possible against frauds and impositions by the individual claimants. It was for this reason that all claims were excluded from the consideration of the commission except such as should be referred by the several Governments, and no evidence in support of or against a claim was to be submitted except through or by the Governments. The presentation by a citizen of a fraudulent claim or false testimony for reference to the commission was an imposition on his own Government, and if that Government afterwards discovered that it had in this way been made an instrument of wrong towards a friendly power, it would be not only its right but its duty to repudiate the Act and make reparation as far as possible for the consequences of its neglect if any there had been. International arbitration must always proceed on the highest principles of national honor and integrity. Claims presented and evidence submitted to

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In entering into the award, each government relied upon the honor of the other, for protection against fraudulent claims, and, hence, when a citizen presented a false claim, he imposed upon his own government, which might, as a matter of duty, when it became aware of the fraud, make reparation as far as it lay in its power so to do.

§ 125. Liberal construction.—The general rule of the construction of treaties is that they shall be liberally construed for the purpose of effectuating the apparent intention of the parties to obtain equality and reciprocity between them, and words are to be taken in their ordinary signification as they are understood in the public law of nations. They are not to be understood in any artificial or special sense that may be placed upon them by local law, unless it is clear that such restricted sense was intended.[30]

Vattel says: "The reason of the law or of the treaty—that is to say, the motive which led to the making of it, and the object in contemplation at the time—is the most certain clue to lead us to the discovery of its true meaning; and great attention should be paid to this circumstance, whenever there is question either of explaining an obscure, ambiguous, indeterminate pas-

such a tribunal must necessarily bear the impress of the entire good faith of the government from which they come, and it is not to be presumed that any government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding. No technical rules of pleading as applied in municipal courts ought ever to be allowed to stand in the way of the national power to do what is right under all the circumstances. Every citizen who asks the intervention of his own government against another for the redress of his personal grievances must necessarily subject himself and his claim to these requirements of international comity. None of these cases cited by counsel are in opposition to this. They all relate to the disposition to be made of the proceeds of international awards after they have passed beyond the reach of the governments and into the hands of private parties. The language of the opinions must be construed in connection with this fact. The opinion of the Attorney General in Gibbs' Case, 13 Ops. Attys. Gen. 19, related to the authority of the executive officers to submit the claim of Gibbs to the second commission after it had been passed on by the first, without any new treaty between the Governments to that effect, not to the power to make such a treaty."

[30] De Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. Rep. 295, 33 L. ed. 642; In re Wyman, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379. See, also, United States v. Auguisola, 1 Wall. 352, 17 L. ed. 613.

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sage in a law or treaty, or of applying it to a particular case. When once we certainly know the reason which alone has determined the will of the person speaking, we ought to interpret and apply his words in a manner suitable to that reason alone; otherwise, he will be made to speak and act contrary to his intention, and in opposition to his own views." [31]

If two constructions can be placed upon a treaty, one favorable to rights claimed under it, the other restrictive, preference will be given to the favorable construction.[32]

§ 126. **Repugnant clauses.**—As a treaty under the Constitution is equivalent to an act of Congress, a treaty repealing a prior act of Congress and an act of Congress repealing a prior treaty when they are in conflict, it follows that the rules of construction applied to two repugnant or inconsistent statutes will prevail. President Woolsey, in his treatise on International Law, lays down the following rules of construction in cases of repugnancy:

"That earlier clauses are to be explained by later ones, which were added, it is reasonable to suppose, for the sake of explanation, or which at least express the last mind of the parties. So, also, later treaties explain or abrogate older ones.

"Special clauses have the preference over general, and for the most part prohibitory over permissive.

"In treaties made *with different parties* the inquiry in cases of conflict touches the moral obligation as well as the meaning. Here the earlier treaty must evidently stand against the later, and, if possible, must determine its import where the two seem to conflict.

"In general, conditional clauses are inoperative, as long as the condition is unfulfilled; and are made null when it becomes im-

[31] Vattel, bk. II, c. 17, sec. 287.

[32] Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628. But it is also held that as treaties between nations are generally drafted with great care by men of learning and experience, accustomed to select words that will express precisely and fully the intent of the contracting parties, the construction to be placed upon the treaty should be a reasonable rather than a liberal one, and that there is no authority for reading into a treaty under the guise of construction, extraordinary provisions not necessary to give full effect to the intention expressed. The Neck, 138 Fed. 144. It was the purpose at the time of the signature of the treaty of 1800 that all causes of difference should for the time being be disposed of. The Tom, 39 Ct. of Cl. 290.

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possible. Where things promised in a treaty are incompatible, the promisee may choose which he will demand the performance of, but here and elsewhere an act of expediency ought to give way to an act of justice."[33]

§ 127. **Construed as a law.**—A treaty is as much a part of the law of the land as the common law or statutes.[34] Whatever private rights may exist, they must always be subject to treaties made between sovereignties. Individuals seeking an indemnity under such circumstances for injuries committed must look to their respective governments.[35]

The boundary between Virginia and Tennessee which was established between these states, and to which Congress gave consent, will be given effect as the true boundary.[36] Grants made by a *de facto* government of land in its possession, it was held in the state court, were valid as against the state which had the right,[37] but on appeal to the supreme court of the United States reversed the decision, holding that the grants were invalid as against the government to which the territory rightfully belonged.[38]

§ 128. **Courts cannot question rights recognized by nation.**—A treaty made by proper authority becomes the law of the land, and there is no power in the courts to question or in any manner to look into the powers or rights which the nation with whom it was made recognizes;[39] nor can courts inquire whether a treaty was procured by undue influence;[40] nor whether the person ratifying it on behalf of the foreign nation had authority.[41] In case of doubt, the inconveniences that would result from a construction contended for by one party to the treaty may be used as an argument to show that that construction cannot be conformable to the intent of the parties, but a stipulation, though in-

[33] Woolsey's Int. Law, sec. 113.

[34] Jost v. Jost, 1 Mackey, 487.

[35] Fleeger v. Poole, 1 McLean, 185 Fed. Cas. No. 4860; Poole v. Fleeger, 11 Pet. 185, 9 L. ed. 680, where case is affirmed.

[36] Virginia v. Tennessee, 148 U. S. 525, 13 Sup. Ct. Rep. 736, 37 L. ed. 545. The supreme court of the United States has jurisdiction to ascertain and fix disputed boundaries between states. Rhode Island v. Massachusetts, 12 Pet. 725, 9 L. ed. 1261.

[37] Groover v. Coffee, 19 Fla. 79, 20 Fla. 81.

[38] Coffee v. Groover, 123 U. S. 1, 8 Sup. Ct. Rep. 1, 31 L. ed. 51.

[39] Marden v. Ingersoll, 6 Mich. 373.

[40] Leighton v. United States, 29 Ct. of Cl. 288.

[41] Doe v. Braden, 16 How. (U. S.) 635, 14 L. ed. 1090.

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convenient, must be fulfilled if it be explicit.[42] It is not necessary that a person basing his claim upon the provisions of a treaty should make a formal claim of his rights under the treaty, because treaties are a part of the law of every state.[43]

§ 129. **Jurisdiction of crime on foreign ship.**—When a merchant vessel of one country enters the ports of another for the purposes of trade, it is subject to the laws of such other country, unless the two countries have, by treaty or otherwise, reached some different understanding or agreement.[44]

The owner of the vessel is entitled to protection from the government, and owes such allegiance to it as is due to such protection. But experience has demonstrated that commerce would be benefited if the local government would refrain from interference with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew among themselves. If crimes, however, are committed on board of the vessel of such a character that they disturb the peace and tranquility of the country to which the vessel has been brought, the local tribunals have the power to assert their authority, and the offenders cannot, by the principles of comity or usage, claim exemption from the operation of the local laws. While this is the general public law, it has been found convenient for nations having commercial intercourse to enter into treaties and conventions to settle and define the rights and duties of such nations, and thus obviate the embarrassment that would arise from the exercise of different jurisdictions. Under the convention entered into with France in 1788 for the purpose of defining and establishing the functions and privileges of their respective consuls, it was provided that the consuls should exercise police power over the vessels of their respective nations.[45]

[42] Mr. Livingston, Secretary of State, to Baron Lederer, November 5, 1882, MS. Notes to For. Leg., V, 63.

[43] Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188.

[44] The Exchange, 7 Cranch, 144, 3 L. ed. 296; United States v. Diekelman, 92 U. S. 520, 23 L. ed. 742; 1 Phillmore's International Law, 3d ed., 483, sec. CCCLI; Twiss' Law of Nations in Time of Peace, 229, sec. 159; Creasy's Int. Law, 167, sec. 176; Halleck's Int. Law, 1st ed., 171. This is the rule enforced in the English courts. Regina v. Cunningham, Bell C. C. 72; S. C., 8 Cox C. C. 104; Regina v. Anderson, 11 Cox C. C. 198; S. C., L. R. 1 C. C. 161; Regina v. Keyn, 13 Cox C. C. 403.

[45] 8 Stats. at Large, 106.

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Two cases arose under this convention, in one of which an assault was committed by one of the crew upon another, and the second was where a severe wound had been inflicted by the mate upon one of the seamen for having made use of the boat without permission.[46]

§ 130. Rule declared by supreme court of United States.—The rule declared by the supreme court of the United States is: "Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction."[47]

The convention between the United States and Belgium, concluded March 9, 1880, contained a clause that consuls "shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere except when the disorder that has arisen is of such a nature as to disturb tranquility and public order on shore, or in the port." This provision, it was held, did not deprive the local authorities of jurisdiction of a homicide which had been committed on board of a Belgian vessel moored to the dock in an American port, where the homicide was the consequence of an affray between two Belgians, both of whom belonged to the crew of the vessel, notwithstanding that it occurred below deck and was only seen by other members of the crew.[48]

[46] See for an account of these cases, Wheaton's Elements of International Law, 3d ed., 153; 1 Phillmore's International Law, 3d ed., 484.

[47] Mali v. Keeper of the Common Jail, 120 U. S. 1, 7 Sup. Ct. Rep. 385, 30 L. ed. 565.

[48] Mali v. Keeper of the Common Jail, 120 U. S. 1, 7 Sup. Ct. Rep. 385, 30 L. ed. 565. State and federal authorities have concurrent jurisdiction over certain crimes committed on board of vessels lying in a domestic port. Ex parte Byers, 32 Fed. 408. Only in cases of peculiar urgency should a person held in custody by state authorities be discharged by a federal judge on *habeas corpus* in advance of proceedings in state courts to determine the validity of the arrest: Whitten v. Tomlinson, 160 U. S. 242, 16 Sup. Ct. Rep. 301, 40 L. ed. 412.

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§ 131. **Most favored nation clause.**—Treaties generally, if not universally, contain a clause that the subjects of each nation shall enjoy in the territory of the other all the rights, privileges and immunities of the subjects of the most favored nation. While the language employed is not always the same, substantially, the object to be attained is to place all nations on an equality. This clause, and the rights claimed under it, have frequently formed the subject of diplomatic controversy. In 1817 Mr. Adams said that one nation should not enjoy as a gift that which is conceded to other nations for a full equivalent.[49]

Where a claim was made by the Austrian chargé d'affaires for the benefit of the stipulation in the treaties between the United States with Russia and certain other countries, conferring upon consuls the power to hear disputes between the masters and crews of vessels, the Department of State responded: "Seeing that the right now under consideration, where it can be claimed under a treaty wherein it is expressly conferred, is, in every such instance, given in exchange for the very same right conferred in terms equally express upon the consuls of the United States, it cannot be expected that it will be considered as established by the operation of a general provision, which, if it were allowed so to operate, would destroy all reciprocity in this regard, leaving the United States without that equivalent in favor of their consuls, which is the consideration received by them for the grant of this right wherever expressly granted."[50]

A Danish ship is not entitled, under the most favored nation clause in the treaty with Denmark, to claim exemption from the head money exacted for immigrants under an act of Congress.[51] Nor is sugar imported from the dominions of Denmark entitled to exemption from duty because sugar imported from the Hawaiian Islands is so exempted, as such exemption was made in consideration of reciprocal concessions.[52]

[49] Mr. Adams, Secretary of State, December 23, 1817, Am. State Papers, For. Rel., V, 152.

[50] Mr. Buchanan, Secretary of State, to the Chev. Hülsemann, May 18, 1846, MS. Notes to German States, VI, 130.

[51] Thingvalla Line v. United States, 24 Ct. of Cl. 255.

[52] Bartram v. Robertson, 122 U. S. 116, 7 Sup. Ct. Rep. 1115, 30 L. ed. 1118. Mr. Frelinghuysen said in 1884 in a note to Mr. Romero, the Mexican Minister: "While this government cannot agree with that of Mexico, that under the provisions of the most favored nation clause another nation becomes entitled to

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Stipulations of a treaty declaring what articles shall and what shall not be considered as contraband do not come within the operation of the most favored nation clause.[53] Engagements of extradition are founded on particular treaty stipulations, and are not to be inferred from a favored nation clause.[54] But the most favored nation clause will apply to a stipulation conferring upon consular officers the right to administer on the estates of their deceased countrymen.[55]

A pilotage law of the United States may provide for the exemption from pilotage of American coast vessels without infringing a treaty stipulation that "no higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States."[56]

§ 132. Rules of construction codified.—Mr. J. C. Bancroft Davis, in 1873, codified, for the use of the State Department of the United States, the rules governing the construction of treaties as follows:[57]

"1. A treaty, constitutionally concluded and ratified, abrogates all State laws inconsistent therewith. It is the supreme law of the land, subject only to the provisions of the constitution.[58]

"While, however, treaties are a part of the supreme law of the land, they are nevertheless to be viewed in two lights,—that is to say, in the light of politics and in the light of juridical law. The decision of political questions is pre-eminently the func-

privileges granted by a reciprocity treaty, still as there are various considerations affecting the question as now presented, I content myself with a courteous denial that the most favored nation clause applies to reciprocity treaties, without now entering into any argument on the subject." MS. Notes to Mex., IX, 1.

[53] The James and William, 37 Ct. of Cl. 303.

[54] Cushing, 6 Op. Atty. Gen. 148.

[55] In re Fattosini's Estate, 67 N. Y. Supp. 1119, 33 Misc. Rep. 18; Wyman v. McEvoy, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379.

[56] Olsen v. Smith, 195 U. S. 332, 25 Sup. Ct. Rep. 52, 49 L. ed. 224.

[57] United States Treaties and Conventions, Introductory notes, 1227-1229 (1889).

[58] Citing 6 Op. Atty. Gen. 293, Cushing, and cases cited by him; United States v. Schooner Peggy, 1 Cranch, 103, 2 L. ed. 49; Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568; Gordon's Lessee v. Kerr, 1 Wash. C. C. 322, Fed. Cas. No. 5611; Lessee of Fisher v. Harnden, 1 Paine C. C. 55, Fed. Cas. No. 4819; 8 Op. Atty. Gen. 417, Cushing; 13 Op. Atty. Gen. 354, Akerman.

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tion of the political branch of the government, of the Executive or of Congress, as the case may be; and when a political question is so determined, the Courts follow that determination. Such was the decision of the Supreme Court in cases involving boundary and other questions, under the treaty of 1803 with France, of 1819 with Spain, and of 1848 with Mexico.[59]

"2. A treaty is binding on the contracting parties, unless otherwise provided, from the day of its date. The exchange of ratifications has, in such case, a retroactive effect, confirming the treaty from its date. But a different rule prevails when the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified; it is not considered as concluded until there is an exchange of ratifications.[60]

"3. When a treaty requires a series of legislative enactments to take place after exchange of ratifications, before it can become operative, it will take effect as a national compact, on its being proclaimed, but it cannot become operative as to the particular engagements until all of the requisite legislation has taken place.[61]

"4. Where a treaty cannot be executed without the aid of an Act of Congress, it is the duty of Congress to enact such law. Congress has never failed to perform that duty.[62]

"5. But when it can be executed without legislation, the Courts will enforce its provisions.[63]

[59] Citing Doe et al. v. Braden, 16 How. 635, 14 L. ed. 1090; Foster v. Neilson, 2 Pet. 314, 7 L. ed. 415; The Amiable Isabella, 6 Wheat. 1, 5 L. ed. 191; Grisar v. McDowell, 6 Wall. 363, 18 L. ed. 863; United States v. Yorba, 1 Wall. 412, 17 L. ed. 635; United States v. Pico, 23 How. 326, 16 L. ed. 464; United States v. Lynde, 11 Wall. 633, 20 L. ed. 230; Meade v. United States, 9 Wall. 691, 19 L. ed. 687; United States v. Reynes, 9 How. 127, 13 L. ed. 74; Davis v. Parish of Concordia, 9 How. 280, 13 L. ed. 138; 5 Op. Atty. Gen. 67, Toucey.

[60] Citing Davis v. Parish of Concordia, 9 How. 280, 13 L. ed. 138; Lessee of Hylton v. Brown, 1 Wash. C. C. 343, Fed. Cas. No. 6982; Haver v. Yaker, 9 Wall. 32, 19 L. ed. 571; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547.

[61] Citing 6 Op. Atty. Gen. 750, Cushing, and also chapter 10 of vol. 1, Idem.

[62] Citing 6 Op. Atty. Gen. 296, Cushing, and cases cited.

[63] Citing Foster v. Neilson, 2 Pet. 314, 7 L. ed. 415; United States v. Arredondo, 6 Pet. 735, 8 L. ed. 547.

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"6. Where a treaty is executed in two languages, each the language of the respective contracting parties, each part of the treaty is an original, and it must be assumed that each is intended to convey the same meaning as the other.[64]

"7. Treaties do not generally, *ipso facto*, become extinguished by war. Vested rights of property will not become divested in such cases.[65]

"8. The constitution of the United States confers absolutely upon the government of the United States the power of making war and of making treaties, from which it follows that that government possesses the power of acquiring territory, either by conquest or by treaty.[66]

"9. Such acquisition does not impair the rights of private property in the territory acquired.[67]

"10. A treaty of cession is a deed of the ceded territory by the sovereign grantor, and the deed is to receive an equitable construction. The obligation of the new power to protect the inhabitants in the enjoyment of their property is but the assertion of a principle of natural justice.[68]

"11. In an opinion upon the legislation to carry into effect the treaty of 1819 with Spain, Attorney General Crittenden held that 'An act of Congress is as much a supreme law of the land as a treaty. They are placed on the same footing, and no superiority is to be given to the one over the other. The last expression of the law giving power must prevail; and a subsequent act must prevail and have effect, though inconsistent with a prior act; so must an act of Congress have effect, though inconsistent with a prior treaty.'[69]

[64] Citing United States v. Arredondo, 6 Pet. 710, 8 L. ed. 547.

[65] Citing Society for Propagation of the Gospel v. Town of New Haven, 8 Wheat. 464, 5 L. ed. 662; Carneal v. Ban, 10 Wheat. 182, 6 L. ed. 297.

[66] Citing Am. Ins. Co. v. 366 Bales of Cotton (Canter), 1 Pet. 542, 7 L. ed. 243.

[67] Citing United States v. Morano, 1 Wall. 400, 17 L. ed. 633.

[68] Citing United States v. Arredondo, 6 Pet. 710, 8 L. ed. 547; Soulard v. United States, 4 Pet. 511, 7 L. ed. 938; Delassus v. United States, 9 Pet. 117, 9 L. ed. 71; Mitchell v. United States, 9 Pet. 711, 9 L. ed. 283; Smith v. United States, 10 Pet. 326, 9 L. ed. 442.

[69] 5 Op. Atty. Gen. 345, Crittenden; but see opinions of Justice Chase, Ware v. Hylton, 3 Dall. 236, 5 L. ed. 568, and of Marshall, Chief Justice, United States v. The Peggy, 1 Cranch, 109, 2 L. ed. 49, each pronouncing the opinions of the supreme court.

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"12. Interest, according to the usage of nations, is a necessary part of a just national natural indemnification."[70]

§ 133. **Extent of treaty-making power.**—The question of the extent of the treaty-making power of the United States is an academic one. No treaty ever made has been declared to conflict with the Constitution. In the constitutional convention the question was not discussed, and the only point mooted was as to the placing of the power. When the Constitution came up for ratification, it was freely asserted by its opponents that the treaty-making power was unlimited. In answer to this objection Mr. Madison said: "As to its extent, perhaps it will be satisfactory to the committee that the power is precisely in the new Constitution as it is in the Confederation. In the existing confederacy Congress is authorized indefinitely to make treaties. Many of the states have recognized the treaties of Congress to be the supreme law of the land. Acts have passed within a year declaring this to be the case. I have seen many of them. Does it follow because the power is given to Congress that it is absolute and unlimited? I do not conceive that power is given to the President and Senate to dismember the empire or to alienate any great essential right. I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation. One objection against the amendment proposed is this, that by implication it would give power to the legislative authority to dismember the empire, a power that ought not to be given but by the necessity that would force assent from every man. I think it rests on the safest foundations as it is. The object of treaties is the regulation of intercourse with foreign nations and is external. I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might and probably would be defective. They might be restrained by such a definition from exercising the authority where it could be essential to the interest and safety of the com-

[70] 1 Op. Atty. Gen. 28, Wirt; 5 Op. Atty. Gen. 550, Crittenden; Geneva Award, 4 Papers Relating to Washington, 53.

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munity. It is most safe, therefore, to leave it to be exercised as contingencies may arise."[71]

§ 134. General terms used.—The Constitution uses general terms in speaking of treaties. In his lectures on the Constitutional Jurisprudence of the United States Mr. Duer states: "More general and extensive terms, also, are used in vesting the power with respect to treaties, than in conferring that relative to laws; and, while the latter is laid under several restrictions, there are none imposed on the exercise of the former, notwithstanding it is committed to the President and Senate, in exclusion of the House of Representatives, and is executed through the instrumentality of agents delegated for the purpose. And although the President and Senate are thus invested with this high and exclusive control over all those subjects of negotiation with foreign powers, which, in their consequences, may affect important domestic interests; yet it would have been impossible to have defined a power of this nature, and, therefore, general terms only were used. These general expressions, however, ought strictly to be confined to their legitimate signification; and in order to ascertain whether the execution of the treaty-making power can be supported in any given case, those principles of the Constitution, from which the power proceeds, should carefully be

[71] 3 Elliott's Debates, 514. It was said by Attorney General Wirt: "The people seemed to have contemplated the National Government as the sole organ of intercourse with foreign nations. It ought to be armed with power to satisfy the fulfillment of all moral obligations, perfect and imperfect, which the law devolves upon us as a nation." 1 Op. Atty. Gen. 392. Richard Henry Lee, who strenuously opposed the adoption of the Constitution, speaking of the clause making treaties the supreme law of the land, said: "By the article before recited, treaties also made under the authority of the United States, shall be the supreme law. It is not said that these treaties shall be made in pursuance of the constitution—nor are there any constitutional bounds set to those who shall make them. The president and two thirds of the senate will be empowered to make treaties indefinitely, and when these treaties shall be made, they will also abolish all laws and state constitutions incompatible with them. This power in the president and senate is absolute, and the judges will be bound to allow full force to whatever rule, article or thing the president and senate shall establish by treaty, whether it is practicable to set any bounds to those who make treaties, I am not able to say; if not, it proves that this power ought to be more safely lodged." Ford's Pamphlets on the Constitution, 311.

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applied to it. The power must, indeed, be construed in subordination to the Constitution; and however, in its operation, it may qualify, it cannot supersede or interfere with, any other of its fundamental provisions, nor can it ever be so interpreted as to destroy other powers granted by that instrument. A treaty to change the organization of the Government, or annihilate its sovereignty, or overturn its Republican form, or to deprive it of any of its constitutional powers, would be void; because it would defeat the will of the people, which it was designed to fulfill." [72]

[72] Lectures on the Constitutional Jurisprudence of the United States, 2d ed., 228.

Judge Story, speaking of the construction that should be placed upon general terms used in the Constitution, says: "Where the power is granted in general terms, the power is to be construed, as co-extensive with the terms, unless some clear restriction upon it is deducible from the context. We do not mean to assert, that it is necessary, that such restriction should be expressly found in the context. It will be sufficient, if it arise by necessary implication. But it is not sufficient to show that there was, or might have been, a sound or probable motive to restrict it. A restriction founded on conjecture is wholly inadmissible. The reason is obvious; the test was adopted by the people in its obvious and general sense. We have no means of knowing, that any particular gloss, short of this sense, was either contemplated, or approved by the people; and such a gloss might, though satisfactory in one state, have been the very ground of objection in another. It might have formed a motive to reject it in one, and to adopt it in another. The sense of a part of the people has no title to be deemed the sense of the whole. Motives of state policy, or state interest, may properly have influence in the question of ratifying it; but the constitution itself must be expounded, as it stands; and not as that policy, or that interest may seem now to dictate. We are to construe, and not to frame the instrument.

"A power, given in general terms, is not to be restricted to particular cases, merely because it may be susceptible of abuse, and, if abused, may lead to mischievous consequences. This argument is often used in public debate; and in its common aspect addressed itself so much to popular fears and prejudices, that it insensibly acquires a weight in the public mind, to which it is nowise entitled. The argument *ab inconvenienti* is sufficiently open to question, from the laxity of application, as well as of opinion, to which it leads. But the argument from a possible abuse of a power against its existence or use, is, in its nature, not only perilous, but in respect to governments, would shake their very foundation. Every form of government unavoidably includes a grant of some discretionary powers. It would be wholly imbecile without them. It is impossible to foresee all the exigencies, which may arise in the progress of events, connected with the rights, duties, and operations of a government. If they could be foreseen, it would be impossible *ab ante*

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§ 135. **Comments.**—While general terms are used in the Constitution in conferring the treaty-making power, and no express restrictions are placed upon its exercise, it is recognized that restrictions upon the power may be necessarily implied; but such restrictions must not rest on conjecture. They cannot be implied because there might have been a sound motive for such restrictions, but the Constitution must be construed by its own language. The power of taxation may also be an unlimited power, but its existence cannot be denied or its operation limited, because it might be employed to such an extent as virtually to produce confiscation. Likewise it is no argument against the treaty-making power, conferred in general terms, that it might be exercised imprudently or so as to produce mischief.

§ 136. **Chancellor Kent's views.**—Chancellor Kent declared that treaties of peace are obligatory upon the whole nation.

"The department of the government that is entrusted by the Constitution with the treaty-making power is competent to bind

to provide for them. The . means must be subject to perpetual modification and change; they must be adapted to the existing manners, habits, and institutions of society, which are never stationary; to the pressure of dangers, or necessities; to the ends in view; to general and permanent operations, as well as to fugitive and extraordinary emergencies. In short, if the whole society is not to be revolutionized at every critical period, and remodelled in every generation, there must be left to those, who administer the government, a very large mass of discretionary powers, capable of greater or less actual expansion according to circumstances, and sufficiently flexible not to involve the nation in utter destruction from the rigid limitations imposed upon it by an improvident jealousy. Every power, however limited, as well as broad, is in its own nature susceptible of abuse. No constitution can provide perfect guards against it. Confidence must be reposed somewhere; and in free governments, the ordinary securities against abuse are found in the responsibility of rulers to the people, and in the just exercise of their elective franchise; and ultimately in the sovereign power of change belonging to them, in cases requiring extraordinary remedies. Few cases are to be supposed, in which a power, however, general, will be exerted for the permanent oppression of the people. And yet, cases may easily be put, in which a limitation upon such a power might be found in practice to work mischief; to incite foreign aggression; or encourage domestic disorder. The power of taxation, for instance, may be carried to a ruinous excess; and yet, a limitation upon that power might, in a given case, involve the destruction of the independence of the country." 1 Story on Constitution, secs. 424, 425.

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the national faith in its discretion, for the power to make treaties of peace must be co-extensive with all the exigencies of the nation, and necessarily involves in it that portion of the national sovereignty which has the exclusive direction of diplomatic negotiations and contracts with foreign powers. All treaties made by that power become of absolute efficacy because they are the supreme law of the land. There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty. If a nation has conferred upon its executive department without reserve the right of treating and contracting with other States, it is considered as having invested it with all the power necessary to make a valid treaty. That department is the organ of the nation, and alienations by it are valid because they are done by the deputed will of the nation. The fundamental laws of a State may withhold from the executive department the power of transferring what belongs to the States, but if there be no express provision of that kind, the inference is that it has confided to the department charged with the power of making treaties a discretion commensurate with all the great interests and wants and necessities of the nation."[73]

Mr. Cooley says: "The President has power by and with the consent of the Senate, to make treaties, provided two-thirds of the Senators concur. The Constitution imposes no restriction upon this power, but it is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country or robs a Department of the Government or any of the States of its constitutional authority."[74]

§ 137. **Other expressions.**—William Pinkney, in a speech in the House of Representatives, speaking of the power conferred to enter into treaties with foreign powers, said: "Upon the extent of the power or the subjects upon which it may not, there is as little room for controversy. The power is to make *treaties*. The word 'treaties' is *nomen generalissimum* and will comprehend *commercial treaties*, unless there be a limit upon it by which they are executed. It is the appellative, which will take in the

[73] 1 Kent's Commentaries, 161, 162, cited with approval in Holden v. Joy, 17 Wall. 211, 21 L. ed. 523. To the same effect, see Duer's Outlines of Constitutional Jurisprudence of the United States, p. 138.

[74] Constitutional Law, 3d ed., p. 117.

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whole species, if there be nothing to limit its scope. There is no such limit. There is not a syllable in the context of the clause to restrict the natural import of its phraseology. The power is left to the force of the generic term and is therefore as wide as a treaty-making power can be. It embraces all the varieties of treaties which it could be supposed this government could find it necessary or proper to make, or it embraces none. It covers the whole treaty-making ground which this government could be expected to occupy, or not an inch of it.

"It is a just presumption, that it was designed to be coextensive with all the exigencies of our affairs. Usage sanctions that presumption—expediency does the same. The omission of any exception to the power, the omission of the designation of a mode by which a treaty not intended to be included within it might otherwise be made, confirms it." [75]

§ 138. Difference between delegation of treaty-making power and legislative power.—Mr. Calhoun declared that there was a striking difference between the manner of conferring the delegation of the treaty-making and that of the law-making power. The legislative powers vested in Congress are enumerated and specified, while the language relative to the treaty-making power is general. "The reason," he says, "is to be found in the fact that the treaty-making power is vested exclusively in the government of the United States; and, therefore, nothing more was necessary in delegating it than to specify, as is done, the portion or department of the government in which it is vested. It was, then, not only necessary, but it would have been absurd to enumerate, specially, the powers embraced in the grant. Very different is the case in regard to legislative powers. They are divided between the Federal Government and State Governments; which made it absolutely necessary, in order to draw the line between the delegated and reserved powers, that the one or the other should be carefully enumerated and specified; and, as the former was intended to be but supplemental to the latter, and to embrace the comparatively few powers which

[75] Wheaton's Life of Pinkney, 523, 525, 526, cited approvingly by supreme court of United States in Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628.

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could not be either exercised at all, or, if at all, could not be so well and safely exercised by the separate governments of the several States, it was proper that the former, and not the latter, should be enumerated and specified. But, although the treaty-making power is exclusively vested and without enumeration or specification in the government of the United States, it is nevertheless subject to several important limitations.

"It is, in the first place, strictly limited to questions *inter alios;* that is, to questions between us and foreign powers which require negotiations to adjust them. All such clearly appertain to it. But to extend the power beyond these, be the pretext what it may, would be to extend it beyond its allotted sphere; and, thus, a palpable violation of the Constitution. It is, in the next place, limited by all the provisions of the Constitution which inhibit certain acts from being done by the government, or any of its departments;—of which description there are many. It is also limited by such provisions of the Constitution as direct acts to be done in a particular way, and which prohibit the contrary; of which a striking example is to be found in that which declares that, 'no money shall be drawn from the Treasury but in consequence of appropriations to be made by law.' This not only imposes an important restriction on the power, but gives to Congress, as the law-making power, and to the House of Representatives as a portion of the Congress, the right to withhold the appropriations; and, thereby, an important control over the treaty-making power, whenever money is required to carry a treaty into effect;—which is usually the case, especially in reference to those of much importance. There still remains another, and more important, limitation; but of a more general and indefinite character. It can enter into no stipulation calculated to change the character of the government; or to do that which can only be done by the Constitution-making power; or which is inconsistent with the nature and structure of the government, or the objects for which it was formed. Among which, it seems to be settled, that it cannot change or alter the boundary of a State, or cede any portion of its territory, without its consent. Within these limits, all questions which may arise between us and other powers, be the subject matter what it may, fall within the limits of the treaty-making power, and may be adjusted by it."[76]

[76] 2 Calhoun's Works, 132, 135.

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Mr. Rawle, after declaring that the nature and extent of the treaty-making power received a full examination in the state conventions, says: "The most general terms are used in the constitution. The powers of congress in respect to making laws we shall find are laid under several restrictions. There are none in respect to treaties. Although the acts of public ministers, less immediately delegated by the people than the house of representatives, the president constitutionally and the senate, both constitutionally and practically, two removes from the people, are by the treaty-making power invested with the high and sole control over all those subjects which properly arise from intercourse with foreign nations, and may eventually effect important interests home. To define them in the Constitution would have been impossible, and therefore a general term could alone be made use of, which is, however, to be scrupulously confined to its legitimate interpretation. Whatever is wanting in an authority expressed must be sought for in principle, and to ascertain whether the execution of the treaty-making power can be supported, we must carefully apply to it the principles of the Constitution from which alone the power proceeds.

"In its general sense, we can be at no loss to understand the meaning of the word treaty. It is a compact entered into with a foreign power, and it extends to all those matters which are generally the subjects of compact between independent nations. Such subjects are peace, alliance, commerce, neutrality, and others of a similar nature. To make treaties is an essential attribute of a nation. One which disabled itself from the power of making, and the capacity of observing and enforcing them when made, would exclude itself from the international equality which its own interests require it to preserve, and thus in many respects commit an injury on itself. In modern times and among civilized nations, we have no instances of such absurdity. The power must then reside somewhere. Under the articles of confederation it was given with some restrictions, proceeding from the nature of that imperfect compact, to congress, which then nominally exercised both the legislative and executive powers of general government. In our present Constitution no limitations were held necessary. The only question was where to deposit it. Now this must be either in congress generally, in the

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two houses exclusive of the president, in the president conjunctly with them or one of them, or in the president alone."[77]

§ 139. **Expressions of courts.**—In many of the opinions of courts in cases in which treaties have come before them for construction, the broad extent of the treaty-making power is clearly recognized. For instance, Mr. Justice Clifford observed: "Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur, and inasmuch as the power is given in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government, and the relation between the States and the United States."[78]

Mr. Justice Miller said: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this, the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country."[79]

"The power to make treaties with the Indian tribes is, as we have seen, coextensive with the power to make treaties with foreign nations. And it cannot be doubted that the treaty-mak-

[77] Rawle's A View of the Constitution of the United States, 1st ed., p. 57, 2d ed., p. 64.

[78] Holden v. Joy, 17 Wall. 211, 21 L. ed. 534. See, to same effect, the language of Mr. Chief Justice Taney in Holmes v. Jennison, 14 Pet. 569, 10 L. ed. 594.

[79] Edye v. Robertson, 112 U. S. 580, 5 Sup. Ct. Rep. 247, 28 L. ed. 804.

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ing power is ample to cover all usual subjects of diplomacy with different powers."[80]

§ 140. Extends to all proper subjects of negotiation.—"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations is clear."[81] Similar expressions may be found in many cases in which, while the treaty-making power has never been accurately defined, the wide field that it covers is fully recognized.[82]

[80] United States v. 43 Gallons of Whisky, 93 U. S. 188, 23 L. ed. 846.

[81] Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. Rep. 295, 33 L. ed. 642.

[82] "The people of the United States, as one great political community, have willed that a certain portion of the government, including all foreign intercourse, and the public relations of the nations, and all matters of a general and national character, which are specified in the Constitution, should be deposited in and exercised by a national government; and that all matters of merely local interest should be deposited in and exercised by the state governments." Waite, C. J., dissenting. Keith v. Clark, 97 U. S. 476, 24 L. ed. 1071.

"The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States." Gray, J. Fong Yue Ting v. United States, 149 U. S. 711, 13 Sup. Ct. Rep. 1016, 37 L. ed. 905.

"The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the state governments." Bradley, J. Legal Tender Cases, 12 Wall. 555, 20 L. ed. 287.

"While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." Field, J. The Chinese Exclusion Case, 130 U. S. 604, 9 Sup. Ct. Rep. 623, 32 L. ed. 1068.

"In its treaties and conventions with foreign nations this government is a unit." Brown, J. Downes v. Bidwell, 182 U. S. 263, 21 Sup. Ct. Rep. 770, 45 L. ed. 1097.

"The American states, as well as the American people, have believed a close and firm union to be essential to the liberty and to their happiness.

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§ 141. Comments.—By the Constitution, the United States is a sovereign and independent nation, and it is the only government recognized by the Constitution as possessing a national character, and to it are intrusted all the powers that relate to intercourse with other nations. It is one nation, and in all treaties which it makes, it is a unit. It is the will of the people of the United States, as expressed in their Constitution, that that branch of sovereignty which has to do with foreign intercourse, and the relations that one nation bears to another, by treaty or international law, should be vested in the national government. It is the only government that is capable of managing the interests of the American people, in foreign relations, while to the state governments are left all matters of purely local interest. The national government, being invested with the powers that appertain to independent nations, may, in dealing with foreign nations, exercise such powers as may be necessary for the maintenance of its independence and security.

They have been taught by experience that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective states, adopt the present constitution.''

''That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other.'' Marshall, C. J. Cohen v. Virginia, 6 Wheat. 380-413, 5 L. ed. 259.

''The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.'' Field, J. In re Ross, 140 U. S. 463, 11 Sup. Ct. Rep. 897, 35 L. ed. 581.

''The subject of treaties . . . . is to be determined by the law of nations.'' Iredell, J. Ware v. Hylton, 3 Dall. 261, 1 L. ed. 568.

''One of the ordinary incidents of a treaty is the cession of territory.'' Brown, J. De Lima v. Bidwell, 182 U. S. 195, 21 Sup. Ct. Rep. 743, 45 L. ed. 1041.

''By the stipulations of a treaty are to be understood its language and apparent intention manifested in the

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§ 142. Views of Mr. Butler.—Mr. Butler, who has written a valuable treatise on the treaty-making power of the United States, states his belief to be that the government of the United States is fully endowed with all the essential attributes of sovereignty, and that he feels justified in expressing the following opinion:

"First: That the treaty-making power of the United States, as vested in the Central Government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that Government as an attribute of sovereignty, and that it extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any manner whatever and vested that power exclusively in, and expressly delegated it to, the Federal Government.

instrument, with a reference to the contracting parties, the subject-matter, and the persons on whom it is to operate." Baldwin, J. United States v. Arredondo, 6 Pet. 710, 8 L. ed. 547.

"No one can doubt that a treaty may stipulate that certain acts shall be done by the executive; and others by the judiciary." Chase, J. Ware v. Hylton, 3 Dall. 244, 1 L. ed. 568.

"I admit that a treaty, when executed pursuant to full power, is valid and obligatory, in the point of moral obligation, on all, as well as on the legislative, executive, and judicial departments (so far as the authority of either extends), which in regard to the last, must, in this respect, be very limited, as on every individual of the nation, unconnected officially with either; because it is a promise in effect by the whole nation to another nation, and if not in fact complied with, unless there be valid reasons for noncompliance, the public faith is violated." Iredell, J. Ware v. Hylton, 3 Dall. 272, 1 L. ed. 568.

"This court is bound to give effect to the stipulations of a treaty in the manner and to the extent which the parties have declared, and not otherwise: We are not at liberty to dispense with any of the conditions and requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the model parts of the treaty, equally give the rule to judicial tribunals." Story, J. The Amiable Isabella, 6 Wheat. 72, 5 L. ed. 191.

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"Second: That this power exists in, and can be exercised by, the National Government, whenever foreign relations of any kind are established with any other sovereign power, in regulating by treaty the use of property belonging to States or the citizens thereof, such as canals, railroads, fisheries, public lands, mining claims, etc.; in regulating the descent or possession of property within the otherwise exclusive jurisdiction of States; in surrendering citizens and inhabitants of States to foreign powers for punishment of crimes committed outside of the jurisdiction of the United States or of any State or territory thereof; in fact, that the power of the United States to enter into treaty stipulations in regard to all matters, which can properly be the subject of negotiation between sovereign states, is practically unlimited, and that in no case is the sanction, aid or consent of any State necessary to validate the treaty or to enforce its provisions.

"Third: That the power to legislate in regard to all matters affected by treaty stipulations and relations is co-extensive with the treaty-making power, and that acts of Congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with State laws or provisions of State constitutions.

"Fourth: That all provisions in State statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequent thereto, must give way to the provisions of the treaty, or act of Congress based on and enforcing the same, even if such provisions relate to matters wholly within State jurisdiction." [83]

§ 143. **Comments.**—The treaty-making power must exist somewhere. Power is divided between the federal and state governments, and all power not granted is reserved to the people. The United States is a nation, and the only sovereignty that foreign powers can recognize. The constitution does not define nor limit the kind of treaties that can be made. The treaty power is in a measure incidental to the war power, and under the necessity for national preservation, or even for national benefit, many things can be done that are not explicitly enumerated in the

[83] 1 Butler's Treaty-making Power of the United States, p. 5, sec. 3.

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constitution. But, still, with all that, it cannot be said that the treaty-making power is unlimited. What the limits are, no one can correctly state, and it is possible that no treaty will ever be made in which the power to make the treaty will be seriously questioned. But if there ever appears a clear case in which a treaty conflicts with the Constitution, then either the Constitution or the treaty must govern, and there can be little doubt that in such a case the treaty would yield to the Constitution. All that can be safely said is that the treaty power is broad and comprehensive, and extends to all matters of governmental concern that do not conflict with the Constitution, which after all is not saying much, as it still leaves open the question of what is a conflict. But, happily, the question has never arisen, and it is doubtful if it ever will.

§ **144. Panama canal zone.**—A suit was commenced by a citizen of Illinois to restrain the Secretary of the Treasury from paying out money for the purchase of property for the construction of a canal at Panama, from borrowing money on the credit of the United States, and from issuing bonds or making any payments under the congressional act providing for the acquisition of the property. The supreme court of the United States said there were many objections to the bill. "Among them are these: Does plaintiff show sufficient pecuniary interest in the subject matter? Is the suit not really one against the government, which has not consented to be sued? Is it any more than an appeal to the courts for an exercise of governmental powers which belong exclusively to Congress?" The court said that it would not stop to consider these or similar objections, but that its passing of them in silence should not be taken as even an implied ruling against their sufficiency, but that it preferred to base its decision on the general scope of the bill. The contention was made that title was not acquired as had been provided by a prior act of Congress, by treaty with the Republic of Colombia. The Republic of Panama seceding from the Republic of Colombia was recognized as a nation by the President, and a treaty with it ceding the canal zone was properly ratified. Several acts were passed by Congress based upon the title of the United States which it had acquired by a treaty with the Republic of Panama. The court held that a subsequent ratification was

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equivalent to original authority, and that "It is too late in the history of the United States to question the right of acquiring title by treaty." The title of the United States was not in any manner affected because the treaty omitted some of the technical terms used in ordinary conveyances of real estate, nor because it failed to define the exact boundary of the canal zone, where the description was sufficient for identification, and by the concurrent action of the two nations which alone were interested, the boundaries had been practically defined.[84]

§ 145. **Right to attend public schools.**—What rights have alien children under treaty provisions to attend the public schools of a state and what power have the state or municipal authorities to provide separate schools for the children of any particular nationality, or to exclude them from the schools altogether? These questions involve to the fullest degree the extent of the treaty-making power of the United States on the one hand and the police power or powers to regulate its own internal affairs by the state on the other. This question recently arose in California, and became the subject of diplomatic correspondence and negotiation between the Department of State and the representatives of the Empire of Japan, and finally resulted in the United States commencing a suit in equity to enforce what were claimed to be rights guaranteed by a treaty.

§ 146. **Treaty provisions.**—The treaty of November 22, 1894, between the United States and Japan provided, in the first article:

"The citizens or subjects of each of the two High Contracting Parties shall have full liberty to enter, travel, or reside in any part of the territory of the other Contracting Party, and shall enjoy full and perfect protection for their persons and property. . . . .

"In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same

[84] Wilson v. Shaw, 204 U. S. 24, 51 L. ed. 351.

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privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation."

§ 147. **Constitution and statutes of California.**—The Constitution of the state of California provides, in article 9:

"SECTION 1. A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."

"SEC. 5. The Legislature shall provide for a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

"SEC. 6. The public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools, and technical schools as may be established by the Legislature, or by municipal or district authority. The entire revenue derived from the State school fund and from the general State school tax shall be applied exclusively to the support of the primary and grammar school."

The public school system required by the Constitution is established by statutes of California, which provide that the state controller must each year "estimate the amount necessary to raise the sum of seven dollars for each census child between the ages of five and seventeen years in the said State of California, which shall be the amount necessary to be raised by *ad valorem* tax for the school purposes during the year."

The statutes also provide that the board of education of a city shall have authority "to establish and enforce all necessary rules and regulations for the government and efficiency of the schools [in that city] and for carrying into effect the school system; to remedy truancy; and to compel attendance at school of children between the ages of six and fourteen years, who may be found idle in public places during school hours."

The Political Code, in the provision relative to schools, declares: "Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and the board of school

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trustees, or city board of education, have power to admit adults and children not residing in the district, whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese, or Mongolian children must not be admitted into any other school." [85]

§ **148. Resolution as to Japanese children.**—On the 11th of October, 1906, the board of education of San Francisco adopted this resolution: "*Resolved*, That in accordance with Article X, section 1662, of the school law of California, principals are hereby directed to send all Chinese, Japanese, or Korean children to the Oriental Public School, situated on the south side of Clay street, between Powell and Mason streets, on and after Monday, October 15, 1906."

By the school system thus established school privileges were provided for all resident children, resident as well as alien, and in estimating the amount to be raised by taxation for school purposes all resident children were included, as likewise the fund for the support of the schools was to be secured by taxation upon the property of all residents, including both aliens and citizens. The law provided for the compulsory attendance of all resident children, whether of aliens or of citizens, but under the resolution of the board of education while free admission to schools in the proximity of their homes to the children of resident aliens of all other nationalities was given, the children of Indians, Chinese and Japanese were excluded from these schools. It is true that the same character of education was given to the Japanese children who might attend the Oriental school, but unless Japanese children should consent to attend such school or should be forced to attend, they would be deprived of an education furnished by the government. It will be noticed that the exclusion of Japanese children was confined to the primary and grammar grades, but they were admitted to the higher grades. The claim made by the government of Japan was that as the children of resident citizens of other foreign countries were ad-

[85] Cal. Pol. Code, sec. 1662.

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mitted to the public schools, the exclusion of citizens of Japan residing in the United States constituted a denial of the same privileges, liberties and rights relating to the right of residence as were accorded to the citizens or subjects of the most favored nation.

§ 149. Debate in United States Senate.—The subject attracted much attention throughout the United States, and was debated ably both in the Senate [86] and the House of Representatives. In

[86] The resolution referred to in the text was called up for debate on December 12, 1906, and the following discussion took place.

"Mr. RAYNER. Mr. President, the proposition covered by this resolution is to my mind a most important one. The President has stated in his message that the Federal Government possesses some power in connection with the subject-matter set forth in the resolution, and that everything within his power shall be done and all of the forces, military and civil, of the United States, which he may lawfully employ will be employed for that purpose. It is very important therefore that we should know, and the country should know, and the President should understand, whether he has any power in the premises at all, because it is quite a serious matter in view of the great calamity that has lately befallen the city of San Francisco for the President to contemplate the bombarding of the city at this time, and to declare war against the boards of county school trustees of California, if there is no justification or pretext upon which such ferocious proceedings can be undertaken.

"With great respect and deference to the President, he is exercising a great many functions — executive, legislative, and judicial, lawful and unlawful, constitutional and unconstitutional. If he is possessed of the idea that he is the supervisor of all of the public schools of the various States of the Union, and he seems to be impressed with this idea, because in the very last paragraph of his message he recommends to Congress the establishment of shooting galleries in all of the large public schools of the country, we must either disabuse his mind of this fancy or we must let him know that we agree with him as to the omnipotence of his jurisdiction. If he can take possession of the public schools of California and compel the State to admit to them Japanese students contrary to the laws of California, he could with equal propriety send us an amendment to the Santo Domingo treaty and demand the admission of the negro children of Santo Domingo into the white schools of South Carolina or of any other State of the Union. Of course, if the people have come to the conclusion that everything that the President recommends is right, then there is hardly any use in contesting any of his propositions or recommendations, and instead of conferring upon him the power to give Congress information of the state of the Union, we might confer upon him the function of furnishing his own peculiar views upon the entire state

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the Senate, Senator Rayner, of Maryland, on December 4, 1906, introduced this resolution: "*Resolved*, That in the opinion of the Senate this Government has no right to enter into any treaty

of the universe and recommending any improvements or changes in the general plan of creation that he may deem expedient, from the cradle to the grave. In fact, the President, upon page 29 of his message, anticipates the cradle and makes a recommendation upon the state of the Union that tends to place in his hands the establishment of the birth rate of the country. Now, if we can only supplement this function by giving him complete jurisdiction over the death rate we will then have a ruler whose ubiquity is uncircumscribed and whose unlimited possibilities are beyond the reach of human contemplation.

"I believe that there is a sufficient residuum of common sense and independent thought in the American people to keep the Executive within the prerogatives of his office and to let him quietly and respectfully understand that the Executive chair is not exactly the place from which to deliver exhortations or a course of didactics upon either the natural rights or the infirmities of the human race, and that in his messages and recommendations he ought to confine himself to the functions prescribed by the Constitution.

"I desire to say, in passing, that I coincide with everything that the President says in praise of the people of Japan. In the war between Japan and Russia my sympathies were entirely with the Government of Japan, and whatever he says in honor of its marvelous race meets with my own hearty commendation. I always thought it was a great shame that through the kindly and well-intentioned offices of the President, Japan should have been overpowered in the conference room when she had been victorious in every battle upon the land and on the sea, and I think that the dauntless courage and the almost superhuman heroism, against overwhelming odds, of her military and naval forces is without a parallel upon the pages of ancient or modern history. I propose to discuss the question under consideration entirely outside of the particular circumstances that environ it, upon general grounds of constitutional law, and certainly with no feeling of hostility upon my part toward this wonderful people with whom this controversy has arisen.

"THE TREATY WITH JAPAN—COMPARISON WITH CHINESE TREATY.

"In my brief argument that I shall address to this body I shall plant myself upon two propositions:

"First, that there is no provision whatever in the treaty with Japan that confers the right that the President speaks of, or gives to the Government of Japan the privileges that it claims in connection with the public school system of California or of any other State.

"Secondly, the more important question, if there was such a provision in this treaty, or any other treaty conferring this right, the treaty would be void and without any authority upon the part of the United States to make it, and in violation of the Constitution and the treaty-making power of the Government.

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with any foreign government relating in any manner to any of the public school systems of any of the States of the Union; and

"The first step that it is necessary for me to take in this discussion is to quote the provisions of the treaty with Japan that have been held to be applicable to the subject in hand, the ratifications of which treaty were exchanged by the respective Governments on the 21st of March, 1895. I will ask the Secretary kindly to read those provisions. It will take but a moment.

"The VICE-PRESIDENT. Without objection, the Secretary will read as requested.

"The Secretary read as follows:

"'ARTICLE I. The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property.

"'They shall have free access to the courts of justice in pursuit and defence of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates, and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.

"'In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation. The citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and subject to the laws, ordinances, and regulations, shall enjoy the right of private or public exercise of their worship, and also the right of burying their respective countrymen, according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose.

"'They shall not be compelled, under any pretext whatsoever, to pay any charges or taxes other or higher than those that are, or may be paid by native citizens or subjects or citizens or subjects of the most favored nation.

"'The citizens or subjects of either of the contracting parties residing in the territories of the other shall be exempt from all compulsory military service whatsoever, whether in the Army, Navy, National Guard, or Militia; from all contributions imposed in lieu of personal service; and from all forced loans or military exactions or contributions.'

"'ARTICLE XIV. The high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor, or immunity which either high contracting party has actually granted, or may hereinafter grant, to the Government, ships,

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"*Resolved, further*, That in the opinion of the Senate there is no provision in the treaty between the United States and the Government of Japan that relates in any manner to this sub-

citizens, or subjects of any other State, shall be extended to the Government, ships, citizens, or subjects of the other high contracting party, gratuitously, if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other upon the footing of the most favored nation.'

"Mr. RAYNER. There is not a clause or a line of this treaty that contains by expression or intendment the slightest reference to the public school systems of any of the States of the Union, or confers any rights whatever upon the citizens of Japan to enjoy the privileges of their public educational institutions. There is not a clause or a line, although I understand that the President has been advised to the contrary, that, to the professional mind, would admit of such a construction. The most liberal interpretation of any of its terms does not allow such an interpolation or insertion to be made. The treaty does not even contain the most-favored-nation clause, except in reference to the particular objects that are therein specifically enumerated.

"If I have made a mistake upon this point let some Senator upon the floor or some of the President's legal advisers upon the treaty refer me to the clause that carries with it such a construction. Let the President elucidate his message upon this point and give us the language in the treaty that authorized him to state that he had any power or jurisdiction over this subject whatever. It cannot be done, because here is the treaty, and no one arises here to justify his construction of it. If there is any decision in the United States that holds that any of the rights granted by the treaty carry with them the privilege to the subjects of Japan of even partaking of the advantages of the educational system of our States, let us have that decision. I have examined them all very carefully that relate to treaties and I find no authority to sustain such a proposition.

"Now, let me call your attention to a very peculiar circumstance, and that is the Burlingame treaty, which was made with China, because that does contain such a provision. It is only a few lines. The Burlingame treaty with China, which was proclaimed on February 5, 1870, has the following provision in it:

"'ARTICLE VII. Citizens of the United States shall enjoy all the privileges of the public educational institutions under the control of the Government of China, and, reciprocally, Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the Government of the United States which are enjoyed in the respective countries by citizens or subjects of the most-favored nation. The citizens of the United States may freely establish and maintain schools within the Empire of China at those places where foreigners are by treaty permitted to reside, and, reciprocally, Chinese subjects may enjoy the same

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ject or in any way interferes with the right of the State of California to conduct and administer its system of public schools in accordance with its own legislation; and

privileges and immunities in the United States.'

"'Of the United States.' It does not say 'of the States,' but of the United States.

"Mr. BLACKBURN. That is a distinction.

"Mr. RAYNER. I say that is a distinction. I am coming to that. Nevertheless it contains a provision that the Japanese treaty does not contain. The Japanese treaty does not give any rights to any public educational institution controlled by the United States.

"Now, as I was going to say, the Japanese treaty contains no such provision as this, and the favored clause does not cover it.

"Mr. FORAKER. Mr. President—

"The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Ohio?

"Mr. RAYNER. I do.

"Mr. FORAKER. If it would not interrupt the Senator, I would ask him if he can state the respective dates of those two treaties?

"Mr. RAYNER. The Burlingame treaty, February 5, 1870. The ratifications of the Japanese treaty were exchanged by the respective governments on the 21st of March, 1895, twenty-five years afterwards, and there is not a word of it in this Japanese treaty. The favored-nation clause does not cover it, because this clause is restricted to the objects that are specified in the treaty and no one of these objects relates to educational privileges; and even if there had been a provision in the Japanese treaty similar to the one in the Chinese treaty, it would not apply to this case, because the treaty with China confers educational privileges in educational institutions under the control of the Government of the United States, and neither the educational institutions of California nor of any other State of the Union are under the control of the United States.

"The educational institutions of the States are not under the control of the Government of the United States, and therefore, by virtue of this provision in this treaty, the Chinese enjoy no privileges at all. Therefore, if this clause had been incorporated in the Japanese treaty, as I shall show a little farther on, it would not cover the proposition we are now discussing.

"Mr. FORAKER. Mr. President—

"The VICE-PRESIDENT. Does the Senator from Maryland yield further to the Senator from Ohio?

"Mr. RAYNER. I do.

"Mr. FORAKER. I wish to call the Senator's attention to the fact that the United States Government has no educational institutions as such, and that immediately following the ratification of the treaty with China, and ever since that, under the clauses granting certain exceptions, Chinese students have been entitled, except as it has been modified by treaty since, to come to this country and seek education in the institutions that are situated within the States and are not at all under the control of the United States Government.

"Mr. RAYNER. There is no doubt about that proposition. Any of the States may admit any Chinese or Jap-

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"*Resolved, further*, That it is the duty of the President of the United States to notify the Government of Japan and notify any foreign government with whom the question may arise that the

anese student or any other sort if they choose. That is entirely within the province of the State, but the question here is a question of alleged discrimination in the public school system of California. Massachusetts or any other State of the Union has a perfect right to admit any Chinese or Japanese who want to come. That does not affect the question, I respectfully submit, that I am discussing. I absolutely deny that the admission of these students into the educational institutions of the State is in compliance with and in furtherance of the treaty.

"I might rest this entire subject right here, because this is an end of the claim of Japan if the treaty does not, either by expression or intendment, contain the controverted matter, but I have arisen for a larger purpose and a deeper inquiry; and inasmuch as what has taken place here may occur over and over again under the treaty-making power of the United States, I shall now proceed to the more important proposition, and that is that this Government has no power under the Constitution of the United States to make any treaty with any foreign government covering the subject in question, or overriding the legislation of any State of the Union in connection therewith.

"THE ISSUES INVOLVED IN THE CONTROVERSY.

"Now, let me quote—because I must say that to me it has been the most interesting subject in constitutional law, at least that I have ever examined or been interested in—the sixth article of the Constitution. It is not an academic discussion; it is likely to occur over and over again with all our oriental possessions, because if the President persists in his purpose, the day will come when he will demand that he has the right, either under the treaty-making power or under the amendments to the Constitution, to exercise this privilege in connection with the admission of foreign students into the public educational institutions of the States.

"Now, one may read this article of the Constitution without understanding it. Just read it. Let a layman read it. It leaves an impression upon the mind of every man who has not studied the Constitution that the treaty overrides the reserved rights of the States whenever it comes in contact with them. No matter how brilliant the lawyer may be, no matter what his talents or resources may consist of, I do not care for the opinion of anyone who has not thoroughly mastered and analyzed the authorities upon this subject and made the proper discriminations between them:

"'This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States—'

"Now, that is the distinction that the extreme school plants itself on between these two propositions. When it speaks of laws, it says laws which shall be made in pursuance of the Constitution. When the Constitution speaks of treaties, it says that

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public educational institutions of the States are not within the jurisdiction of the United States, and that the United States has no power to regulate or supervise their administration."

all treaties which shall be made under the authority not of the Constitution, but of the United States. I shall, I think, demonstrate within a few moments that there is no possible distinction in the authorities between these two clauses.

"The sixth article, which lies at the bottom of this controversy, reads partly as follows:

"'ARTICLE VI. This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.'

"I plant myself firmly and unalterably upon the proposition that we can make no treaty that violates any of the provisions of the Constitution of the United States, that the treaty-making power in the sixth article must be construed *in pari materia* with all the other provisions contained in the Constitution, and if the treaty comes in conflict with any of the limitations of the instrument the treaty must yield and the Constitution prevail.

"As a corollary of this proposition I plant myself upon the doctrine that any treaty that violates Article X of the Constitution and infringes upon the reserved rights of the States which have not been delegated to the General Government, and embraces subjects that belong to the States, and that are not necessary to carry out the purposes of the Government as defined in the Constitution, is *ultra vires* and not within the capacity of the Government to make.

"It is my opinion that this subject involves one of the most interesting problems that has ever been before this body, and that the suggestion in the message of the President, with great respect to him, is not of the slightest value here, because in order to arrive at a proper conclusion upon this important inquiry it is necessary to assiduously examine the great mass of precedents, and authorities, and decisions that have been rendered upon the subject, and I am quite sure that I am entirely within bounds when I say that the President has not undertaken this task.

"THE SEVERAL SCHOOLS OF CONSTRUCTION.

"There are two separate schools of construction upon the subject at issue. These schools are professional schools and schools of commentators and text-writers upon the Constitution, and it is not entirely accurate to designate them as the respective advocates of national and States' rights systems.

"One of these schools claim that the treaty-making power is an inherent element of sovereignty, and though it is a conferred power in the Constitution it would exist as an essential attribute of this Government without delegation, and that when it is once delegated it need not derive its authority from the Constitution, and that whenever it comes in conflict with the provisions

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§ 150. Position of the United States.—In the construction of this treaty the first question that presented itself was as to the extent of the rights included under the term "residence."

of a State law or a State constitution, by the terms of Article VI of the Constitution the treaty prevails. Some of the adherents of this school have proceeded to the most unfortunate limits in their construction of the treaty-making power, and have held that this power is superior to the Constitution and is not in any manner governed by its inhibitions or limitations.

"The second school stands upon the doctrine that the treaty-making power exists for the purpose of carrying out the purposes and objects of this Government as prescribed and defined by the Constitution, and that no treaty is valid that violates the Constitution or that under its provisions surrenders the rights reserved and belonging to the States.

"I am a disciple of the second school, not alone as a party man, but as a student of Constitutional history, and I proceed now to give the reasons for the faith that is in me.

"The most instructive step that I can take in this discussion is to give, in the language of their advocates, the two standards that separate these two political creeds, so that the distinguishing features between them can be clearly and fully comprehended and understood.

"Mr. Charles Henry Butler, the present reporter of the Supreme Court, and a man of great learning and industry, in a valuable text-book that he has written upon the treaty-making power of the United States, which I think is mainly wrong in the conclusions that it reaches, but which is full of the most interesting information upon the subject, thus states his own views and the views of those who belong to the first school of treaty-making power interpretation that I have referred to:

"'First. That the treaty-making power of the United States, as vested in the central Government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that Government as an attribute of sovereignty, and that it extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any manner whatever and vested that power exclusively in and expressly delegated it to the Federal Government.

"'Second. That the power to legislate in regard to all matters affected by treaty stipulations and relations is coextensive with the treaty-making power, and that acts of Congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with State laws or provisions of State constitutions.

"'Third. That all provisions in State statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequent thereto,

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Aside from the question of the power of the government to provide by a treaty properly expressing the privilege for the admission of alien children to the public schools of a state, there

must give way to the provisions of the treaty, or act of Congress based on and enforcing the same, even if such provisions relate to matters wholly within State jurisdiction.'

"The tenets of the school in which I have been trained are succinctly stated in a masterly way by that eminent constitutional lawyer, the Hon. John Randolph Tucker, in a report that he rendered to the Forty-eighth Congress, and which reads, in part, as follows:

"'The language of the Constitution of the United States which gives the character of "supreme law" to a treaty, confines it to "treaties made under the authority of the United States." That authority is limited and defined by the Constitution itself. The United States have no unlimited, but only delegated authority. The power to make treaties is bounded by the same limits, which are prescribed for the authority delegated to the United States by the Constitution. To suppose that a power to make treaties with foreign nations is unlimited by the restraints imposed on the power delegated to the United States would be to assume that by such treaty the Constitution itself might be abrogated and the liberty of the people secured thereby destroyed. The power to contract must be commensurate with and not transcend the powers by virtue of which the United States and their Government exist and act. It cannot contract with a foreign nation to do what is unauthorized or forbidden by the Constitution to be done. The power to contract is limited by the power to do. (3 Story on Const., sec. 1501.)

"'It is on this principle that a treaty cannot take away essential liberties secured by the Constitution to the people. The treaty power must be subordinate to these. A treaty cannot alien a State or dismember the Union, because the Constitution forbids both.

"'In all such cases the legitimate effect of a treaty is to bind the United States to do what they are competent to do and no more. The United States by treaty can only agree with another nation to perform what they have authority to perform under the constitutional charter creating them. The treaty makes the *nexus* which binds the faith of the Union to do what their Constitution gives authority to do. A treaty made under that authority may do this; all it attempts to do beyond it is *ultra vires*—is null, and cannot bind them.'

"In this admirable report and careful review of the treaty-making power Mr. Tucker remarks that—

"'If the treaty-making power extends to the limits that are claimed for it by the advocates of an inherent right, then a treaty may borrow money, regulate commerce, coin money, establish post-offices, and provide for raising armies and navies of the United States, and may thus annul or paralyze all the powers of Congress, and admit a foreign nation to exact, with the alternative of war, a compliance with these sweeping stipulations in the internal government of the people of the United States.'

"I am aware of the fact that some of the conclusions reached by this eminent statesman in this report have

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was the preliminary question whether the right to attend the primary schools was a right, liberty or privilege of residence within the meaning of the language of the treaty, and whether the

been assailed at times, but I am also aware of the fact that the main proposition upon which he stands, and from which I have quoted in the first instance, has never been impeached nor impugned by any Federal or State authority that I know of.

"A TREATY CANNOT VIOLATE THE CONSTITUTION.

"I want to proceed one step further in the particular point that I am now discussing, and I desire to address these remarks to the extreme advocates of the doctrine of an 'unlimited treaty-making power.'

"Let me take subsection 8 of section 9 of Article I of the Constitution of the United States, which provides 'that no title of nobility shall be granted by the United States.' Is there anyone here that believes we would have the right in a treaty to grant a title of nobility to the subject of a foreign government?

"Subsection 4 of section 1 of Article II of the Constitution provides 'that no person except a natural-born citizen . . . . shall be eligible to the office of President, Does anyone here believe that we could make a treaty with a foreign power abrogating this section in its interests?

"Article I of the amendments provides: 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' Is there anyone of the opinion that we could make a treaty with a foreign nation admitting their subject to our shores, and then, in the same treaty, provide that they should not have the privilege of exercising their religious belief?

"Mr. President, I am talking to the extreme advocates of this doctrine. I am coming to the middle class presently. I am taking now the doctrine of the men who claim that the treaty-making power is an inherent power, and is not circumscribed either by the delegated powers or by the limitations or inhibitions of the Constitution. I will come to the men of more moderate views of the first school in a few moments. I am planting this argument now upon the doctrine of Mr. Butler that the treaty-making power is an inherent power that is not governed or controlled at all by the Constitution of the United States.

"Mr. BEVERIDGE. Mr. President—

"The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Indiana?

"Mr. RAYNER. Certainly.

"Mr. BEVERIDGE. Might not the power be inherent in sovereignty and at the same time be limited by the Constitution?

"Mr. RAYNER. Never. It cannot lie in grant and lie in sovereignty. It must either lie in sovereignty or lie in grant. There is no such thing as a granted power under the Constitution carrying within its terms an inherent and sovereign power. I utterly deny the suggestion of the Senator from Indiana. Whatever inherent powers exist have been merged forever in the granted powers of the Constitution. I will give the Senator in a

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order of the board of education directing that Japanese children should be sent to the Oriental school, and directing that they should be excluded from the ordinary schools provided for other

few moments any number of authorities on that from the Supreme Court of the United States that these two powers cannot exist together. It must be either one or the other.

"Mr. BEVERIDGE. That was not my question, although I am happy to hear the Senator upon that.

"Mr. RAYNER. Then I misunderstood the Senator.

"Mr. BEVERIDGE. The question was, Might not the power be inherent in sovereignty and at the same time be limited by the prohibitions of the Constitution?

"Mr. RAYNER. There is not an inherent power in the Government of the United States, because the Government of the United States is not a government of inherent powers. I deny that the Government of the United States has any inherent powers save the power to exist and to perpetuate itself, except the powers contained in the Constitution of the United States, and while it might be inherent and still limited, the fact is it is not inherent. That answers the question.

"Mr. CARMACK. Mr. President—

"The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Tennessee?

"Mr. RAYNER. I do.

"Mr. CARMACK. I wish to suggest to the Senator from Maryland that each of the States prior to the formation of the Constitution of the United States possessed this treaty-making power, and that the General Government possesses it now only by reason of its delegation by the States.

"Mr. CULBERSON. The States possessed it inherently.

"Mr. CARMACK. They possessed it inherently; and the General Government gets it by delegation from the States.

"Mr. RAYNER. I was coming to that proposition in a moment. I think the Senator from Tennessee states that proposition a little too broadly—that is, that the States granted to the United States all the powers they possessed.

"Mr. CARMACK. I did not say that.

"Mr. RAYNER. I beg pardon. I understood the Senator to say that the States had granted to the United States all the treaty-making power.

"Mr. CARMACK. No; I did not mean that; but all the powers the General Government possesses in that respect are derived from the grant by the States—

"Mr. RAYNER. Undoubtedly.

"Mr. BEVERIDGE. We cannot hear a word over here of what is being said on the other side of the Chamber.

"Mr. CARMACK. That all the treaty-making power was in the States prior to the formation of the Constitution. Each State possessed the treaty-making power. When the Constitution was formed the States delegated to the General Government the treaty-making power, and the treaty-making power possessed by the General Government is measured by the extent of that delegation.

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dren to the public schools without discrimination, had the United States power to make such a treaty which should be paramount to the laws of a state? It was contended by the United

that the States have given to the Federal Government the right to make treaties, but they have only given it the right to make such treaties as carry out the delegated powers of the Constitution, and they have never given it the right to make any treaty that interferes with the reserved rights of sovereign States acting within their own borders.

"Mr. BEVERIDGE. Then I understand the Senator does not contend that the States have reserved to themselves at all any portion of the treaty-making power. That is made clear.

"Mr. RAYNER. Look at the Constitution; that settles the rights of the States. The Government can make any treaty that carries out the purpose of the Government. My argument is that you must take the treaty-making powers together with the delegated powers, and you cannot construe one independently with the other.

"Mr. FORAKER. Mr. President—

"The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Ohio?

"Mr. RAYNER. I do.

"Mr. FORAKER. I only want to remark, if I may be permitted to do so, that the result of the Senator's contention, as I understand, is that that part of the old treaty-making power which the States originally possessed has become dormant or has been, by the provisions of the Constitution, placed in abeyance, does not belong to anybody, and cannot be exercised by any governmental authority anywhere.

"Mr. RAYNER. The Senator from Ohio evidently has misunderstood me. I will state the proposition over again.

"Mr. FORAKER. I hope the Senator will not—

"Mr. RAYNER. I want to answer the Senator's observation. There is no dormant power anywhere, because the Government of the United States contains the full treaty-making power for the purpose of carrying out all of its delegated powers, and there is no dormant power any place under the Constitution. Every power under treaties necessary to perfect the delegated powers has been parted with by the States, and the States have parted with their treaty-making power, but I repeat again that the treaty-making power must be construed *in pari materia* with the delegated powers.

"Mr. BACON. Will the Senator permit me a moment?

"The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Georgia?

"Mr. RAYNER. Yes.

"Mr. BACON. In connection with his suggestion as to whether or not the powers are dormant, I wish to call the attention of the Senator to the fact that the Constitution does contemplate that there may be questions in which a State may be interested and which may require a compact or a treaty which are not Federal questions; but its exercise of any power in connection with that is restricted and made dependent upon the consent of Congress. I will read the section to which I allude as illustrative of the question propounded by the Senator

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States that the treaty with Japan did not declare the authority of the United States to compel a state to establish or maintain a system of public schools or to admit alien residents to its schools, but

from Ohio in connection with the contention of the Senator from Maryland. Article 1, section 10, paragraph 3, of the Constitution, to be found on page 201 of the present edition of the Constitution and Manual, reads as follows:

"'No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.'

"If the Senator will pardon me just a moment, the point in connection, I think, with the subject under discussion is illustrative of the fact that it was in the contemplation of the Constitution that there were subjects-matter possible of compacts or treaties in which the States might be directly interested and which did not relate to the General Government in its Federal capacity, but which subjects were in their treatment by the States or in dealing with by the States so restricted that there could be no action with reference thereto unless Congress should consent; in other words, that there were questions which could be and properly would be the subjects-matter of treaties interesting the States directly, but which were subsidiary entirely to the general power of the Government and required to be subject to its supervision.

"Mr. RAYNER. Mr. President, I was coming to that in a moment. While I am quite willing to submit to any interruptions, I think there will be plenty of questions to ask me when I get into the cases.

"Mr. CULBERSON. Will the Senator allow me just to read another section of the Constitution which will clear up this particular matter?

"The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Texas?

"Mr. RAYNER. I was going to read all of those sections, I will say to the Senator. I have the clause in mind to which he refers.

"Mr. CULBERSON. What clause is it?

"Mr. RAYNER. There are three clauses I was going to read from the Constitution. The first clause is in relation to the right of the President and the Senate to make a treaty; the second clause the Senator from Georgia [Mr. Bacon] has read, and the third clause is the clause prohibiting a State from making a treaty.

"Mr. CULBERSON. That is the one I desired to read.

"Mr. RAYNER. Do not misunderstand my purpose. I am willing that the Senator should interrupt me.

"Mr. CULBERSON. It is very pertinent, Mr. President, I think, in this connection, and it would be well to read it. It is section 10, Article I, of the Constitution, which declares:

"'No State shall enter into any treaty, alliance, or confederation.'

"Mr. BEVERIDGE. That is the section to which I specifically called the Senator's attention a moment ago when the Senator ventured the remark that the States had not parted with all their treaty-making power.

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it was asserted by the United States that it could by treaty assure to the resident citizens of another nation a treatment and enjoyment of rights and privileges equal to those afforded to the

"Mr. RAYNER. Do not let the Senator from Indiana misunderstand that proposition. Do not let us get him wrong—

"Mr. BEVERIDGE. No.

"Mr. RAYNER. Because I understand the Senator delivered a lecture on that subject, and while I am against the lecture, I do not want the Senator from Indiana to misconstrue what I have said on this subject. I say, again and again, the States have granted to the Federal Government all their treaty-making powers that are necessary to carry out the purpose of Government as constituted by the Constitution. That is the exact language of Mr. Jefferson, and I cannot improve on it. It has never been improved on, except by Mr. Butler, who says Jefferson has been reversed. Jefferson has never been reversed by anybody except Mr. Butler, and I will take Jefferson against my friend and the distinguished reporter of the Supreme Court on that subject.

"This brings me right down to the precise point involved in this discussion, and that is to the tenth article of the amendments, which reads as follows:

"'ARTICLE 10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.'

"Have we a right to violate the Constitution of the United States and incorporate in a treaty powers not delegated to the United States, powers that are not necessary and proper for carrying into execution the powers that are delegated, and barter away the privileges and rights reserved to the States respectively by virtue of the instrument and of the tenth amendment thereto that I have just referred to? The power of a State to regulate its public school system is clearly among its reserved powers. Have we, therefore, a right to provide in a treaty that the citizens of foreign lands shall possess privileges in the public schools of the States that are prohibited either by the Constitution or by the laws of the State in which they are claimed? If we can, in defiance of the laws and constitution of a State incorporate any such provision in a treaty so as to bind the State, then we can undoubtedly deprive the State of every reserved right that it possesses, and rescind and annul its laws and its constitution whenever they come in conflict with the treaty-making power. I trample upon this appalling doctrine. If ever such a deformity as this should creep into our judicial decisions it would disfigure the Constitution to such an extent that its features would no longer be capable of recognition. It would annul the charter; it would frustrate the intention of the men who framed it; it would undermine the entire framework of the instrument, and it would convert us from a constitutional government into a dictatorship, with the States in abject servitude to Federal power, and with the Executive in practical control of the destinies of the Republic.'

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citizens of any other foreign nation. Under this view, if a state should see fit to extend privileges to alien residents as well as to citizen residents, the state will not be allowed to discriminate against the citizens of that country with which the treaty has

"THE LEADING AUTHORITIES UPON THE SUBJECT.

"I want now to go over the cases. I know it is monotonous in the Senate to read cases, and I will not read them, because I think I can recollect them. There are two lines of cases. The first line is made up of the three cases of Ware v. Hylton (3 Dallas, 199), [1 L. ed. 568], the case of Chirac v. Chirac, from my own State (2 Wheaton, 259), [4 L. ed. 234], and a case in Virginia, Fairfax v. Hunter (7 Cranch, 603), [3 L. ed. 453].

"Ware v. Hylton is the great case that is quoted against the proposition that I am arguing here now. That case was argued by Marshall. It was the only case that Marshall ever argued in the Supreme Court of the United States. It was decided by Justices Chase, Patterson, Cushing, Wilson, and Iredell, and the case covers 100 pages. Let me see if I can give it in a few words.

"Virginia had confiscated the debts of all British creditors. After the Revolution Congress made a treaty with Great Britain providing that British subjects should have the right to prosecute their claims in the courts of the United States without impediments. There was a conflict between the act of Virginia confiscating the debts of British subjects and the treaty of the United States giving British subjects without impediment the right to sue. The United States courts held that the treaty prevailed and that the laws of the State of Virginia were in conflict with it and were void. I give you that case in a very short compass. I want to take the cases of Fairfax v. Hunter and Chirac v. Chirac.

"Mr. MALLORY. Mr. President—

"The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Florida?

"Mr. RAYNER. Certainly.

"Mr. MALLORY. In the case of Hylton v. Ware the Supreme Court expressly declined to give an opinion as to whether a treaty could override the Constitution.

"Mr. RAYNER. I am coming to that in a minute. I have not finished with Ware v. Hylton. I have had Ware against Hylton in my mind for pretty nearly forty years now, and I am going to finish with it in forty seconds, if I can. It occupies a hundred pages in the reports; so I do not intend to read it.

"I am coming now to the other cases in the first line. Maryland passed a law, and so did Virginia, that aliens could not hold property. The Government made a treaty with France that aliens could hold property in the United States. The laws of Virginia and Maryland came into conflict with the treaty, and the Supreme Court of the United States held that the treaty prevailed. Those are the two cases that are cited to sustain the proposition that Mr. Butler is contending for and against the proposition that I am advocating. I want to say one word about those cases. The treaty referred to in Chirac v. Chirac and in Ware v. Hylton was made under the Articles of Confedera-

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been entered into. If the state grants privileges to the citizens of one foreign country, it cannot deny to the citizens of another country such privileges. It was not contended that the state was obligated to supply education, but that if a state did choose

tion. It was not made under the Constitution at all. If you will look at the sixth article of the Constitution, you will see that it ratifies all treaties that have been made. This was one of the treaties that it ratified, because it was a treaty under the Articles of Confederation, and, furthermore, Justice Cushing, in uniting in the opinion of the court, says that Virginia was a party to the treaty, and being a party to the treaty she could not abrogate her own act, and she was estopped by having participated in it and having been a party to it. We all recollect that under the Articles of Confederation it was necessary that nine States should assent to a treaty before it became effective.

"Let me get to the second line of cases, which the Senators from the Pacific coast will recollect without my going into details. Both California and Oregon passed laws in reference to this question. California passed a law that no Chinese laborers should be employed by any corporation, and Oregon passed a law that Chinese laborers should not be employed upon the public works of that State. The question came up under the Chinese treaty—and the cases are reported in 5 and 6 Sawyer; they are circuit court cases—the question came up under the Chinese treaty, Does the treaty prevail or does the law of California and the law of Oregon prevail? Is the law of California a valid law which provides that no Chinese laborer shall be employed by any corporation in the State of California? Is the Oregon law a valid law which provides that no Chinese laborer shall be employed upon any public works in Oregon? The Supreme Court said no. Why? Because, they held, the treaty having provided that Chinese at that time should have the right to live here, that the right to live here carried with it the right to labor here; that a man cannot live without earning a living; that if we had the right by treaty to give them the privilege of coming here, the treaty by intendment and construction carried with it their right to earn a living; but the court never touched upon the reserved rights of the States.

"Now, I want to take up the last case I am going to quote on the other side of this subject, because I want to argue it fairly. I come now to the decision in 92 United States, that most unfortunate decision of the Supreme Court of the United States. It does not trench at all upon the argument I am now making. California provided that no woman of ill-repute should come into the ports of California. That is the Freeman case (92 U. S.). What did the Supreme Court decide there? As the Senator from Wisconsin knows, they did what they had never done before. They went back of that statute. They never construed the statute according to the language of the statute, but they held that California intended, by that provision of her law, to exclude Chinese women, although there was not a word said about Chinese women or women of any other race. It was one of those peculiar cases in which

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to supply education as a governmental function, it could not discriminate, and that while the state was at liberty to maintain a school system or not, yet if it did provide such a school system, the schools of which alien children generally were permitted to

the Supreme Court of the United States has gone into the motives of a State legislature in order to determine the validity of her statutes. But, Mr. President, when they come to decide that case they never touched upon the reserved rights of the State. If you will examine the Freeman case you will see that the Supreme Court held in that case that it was a regulation of commerce, and that California had passed a statute violating that article of the Constitution which gives the Congress of the United States the right to regulate commerce with foreign nations.

"Now I want to give my cases. I could give numbers of other cases, but before I give my cases, I wish to read one or two extracts from this author whom I have quoted here upon several occasions, to show how he contradicts himself upon this point, and how, when he is arguing against himself, he is finally forced to the conclusion that he has made a mistake, and that you can not make a treaty which interferes with the reserved rights of the State; and the only question to his mind is whether it is a reserved right of the State. If it is once settled that it is, when you once admit it is a reserved right of the State, then it cannot come within the treaty-making power, because you can no more violate article 10 of the Constitution than you can violate any other article of the Constitution in connection with its inhibitions and limitations.

"Let me read a very peculiar passage from this author against himself. I am quoting now from a hostile authority to substantiate the propositions for which I am contending, because I have the most eminent authorities in the country to sustain the propositions upon which I stand.

"I read from page 31 of Butler on the Treaty-Making Power, a most interesting book. If it were not all wrong on this point it would be the most valuable book upon the subject that we have in the United States. Upon page 31, section 344, of this work we find the statement which I shall read, made by my friend, Mr. Butler, whom I know personally very well, and of whom I think very highly, and I do not intend that any criticism of mine upon his work shall in the slightest degree reflect upon his great industry and talent as a lawyer and as an author. He represents the same school that my friend the Senator from Indiana represents—the school that believes that we are a government of inherent sovereignty.

"'SEC. 344. *State statutes upheld; Chinese laundry cases.*—It must not be presumed, however, that the Federal courts have always interfered to prevent State action in regard to matters which are wholly under their control, and that they have used the treaty-making power as an excuse for interfering in their internal affairs. In 1885, the same learned justice of the Supreme Court who had declared the San Francisco queue ordinance invalid sustained a municipal ordinance of San Francisco imposing certain regulations and restrictions upon laundries, and which was as un-

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the right of the inhabitants of San Francisco to have their children attend the public schools a right of "residence" within the meaning of that word as used in the treaty? Does the San Francisco School Board deny to Japanese residents the same "privi-

zen of the United States without being a citizen of any State.

" '—those which are granted by a State to its citizens and which depend solely upon State laws for their origin and support are not within the constitutional inhibition and may lawfully be denied to any class or race by the State at its will and discretion.

" 'It seems also that as the privilege of receiving an education at the expense of the State is created and conferred only by State laws, it may be granted or refused to any individual or class at the pleasure of the State.'

"Mr. FULTON. May I ask the Senator from Maryland a question?

"Mr. RAYNER. Certainly.

"Mr. FULTON. I wish to say first that I am in accord with the Senator's view—that the Federal Government cannot by treaty invade the right of a State to regulate its own school system. But a question has occurred to my mind, and I wish to ask the Senator from Maryland if it has occurred to his; and if so, whether he has reached a conclusion on it. It is this: Can the Congress and the President, in the exercise of the treaty-making power, invade the rights of a State—what we will term the 'reserved' rights of a State—to any greater extent than it can by direct legislation? We will concede, I think, for instance, that Congress may not by direct legislation change the laws of a State providing who may hold property within the State—who may own real estate. That is a matter concerning which a State ordinarily would have the right to legislate, and concerning which the Congress could not interfere by direct legislation. Yet the Supreme Court has held that by a treaty a law of a State in that regard may be annulled.

"Now, then, the question which has arisen in my mind is to what extent may the treaty-making power invade the rights of a State beyond what Congress may invade them by legislation, or can it?

"Mr. RAYNER. And that, Mr. President, is not only a very pertinent question, but it is a question that would present a great deal of difficulty in its solution if certain cases in the Supreme Court, which I am going to quote, did not fully cover it. That is the point I am coming to, Can the United States by treaty go beyond the delegated powers of the Constitution? Admitting it cannot violate the Constitution, is the treaty-making function circumscribed by the Constitution? The first case that arose was a California case, which was quoted by the Supreme Court with approval. It was The People ex rel. the Attorney-General v. Nagle.

"The State of California, as the Senator from California will remember, had imposed a license upon foreigners engaged in working gold mines in that State, and the question arose whether California, under the treaty, had the right to pass such a law. . . . .

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leges, liberties and rights" of public school education as it gives to her own citizens or the citizens of other countries, being residents of San Francisco, by requiring Japanese residents to send their children to a separate school?

"OPINION OF THE COURT.

"In addition to this case, I want to refer to the important cases in 119 Federal Reporter, page 381, and in 5 Howard, page 613, [12 L. ed. 279], to the opinion of Justice Daniel, which is concurrent upon the proposition from which I quote, and which reads as follows:

"'This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the Federal Government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the General Government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers, for there can be no "authority of the United States," save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State.'

"I wish to refer now to a case in 118 Federal Reporter. This was a case where a Chinese girl filed a petition for a mandamus against the public school trustees of San Francisco, I think, asking admission into the white school. It was denied. The case went to the United States court, and the court said that she had no right to be admitted into the white public schools of California; that there were schools set apart for her, and she could go into those schools. Is it not a strange thing that California can pass a law providing that the Chinese children who live there shall be separated in the schools, and cannot pass a law that the Chinese children who do not live there, those who shall come there hereafter, shall be not separated, but that they must be put in the white schools?

"Mr. FLINT. Mr. President—

"The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from California?

"Mr. RAYNER. Certainly.

"Mr. FLINT. The language of the statute is 'Mongolian,' not 'Chinese.'

"Mr. RAYNER. Yes, Mongolian.'

"Mr. FLINT. It includes Japanese?

"Mr. RAYNER. The Japanese hold that they are not Mongolians; but outside of that, I am on a proposition of law now. The Senate will sustain me in the proposition, without quoting the cases that the court has absolutely decided that children of Chinese parents have no right to go into the same schools with white children in California; and that

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He then said: "This question may be affected by the location of and accommodation in the separate Mongolian school of San Francisco. We understand that there is but one Mongolian public school in the city.

"If it should be decided that, within the meaning of the treaty, a right to attend a public school is a right of residence, has been approved of by the Supreme Court of the United States. How is it possible to hold that the Chinese children who live there can be separated and segregated, but that children living in China or Japan who may come here cannot be separated and segregated, but must go into the white schools?

"Let me get back again now to what Jefferson said—it is just three lines. He said it long ago, but not too long ago to be forgotten, and this is the proposition on which Mr. Butler says Mr. Jefferson has been reversed:

"'By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty and cannot be otherwise regulated. It must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way.'

"That is a concise but a stately statement of the proposition upon which I have planted myself to-day. . . . .

"In addition to the cases that I have cited, and in closing the entire reference, I desire to now advert to several diplomatic precedents of great value upon this subject. The first incident took place during the administration of Mr. Marcy over the Department of State, and I quote his opinion in the matter:

"'[Mr Marcy, Secretary of State, to Mr. Mason, minister to France, September 11, 1854.]

"'It is not, as you will perceive by examining Mr. Drouyn de L'Huys' dispatch to the Count de Sartiges, the application of the "principle" to the particular case of M. Dillon, which is to be disavowed, but the broad and general proposition that the Constitution is paramount in authority to any treaty or convention made by this Government. This principle, the President directs me to say, he cannot disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was the paramount law.'

"The second incident also took place during the administration of Mr. Marcy:

"'[Mr. Marcy, Secretary of State, to Mr. de Figaniere, Portuguese chargé d'affaires, March 27, 1855.]

"'Although the language of Article II of the consular convention between the United States and France of February 23, 1853, exempting consuls from compulsory process, is general and unrestricted in terms, "yet it is here held that it does not take away the right which the defendant

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and that the action of the San Francisco School Board is a denial of 'the same privileges, liberties and rights' in respect to public school education which are granted to other residents, the question would remain, whether the act of the San Francisco authorities could be justified under the clause which excepts 'laws, ordinances and regulations with regard to police and public security.' "

in a criminal prosecution has to resort to such process to procure the witnesses in his favor, for this right is secured to him by the express language of the United States Constitution." That instrument is paramount in authority to the laws of Congress or of any of the States, and to all treaty stipulations.'

"At a very late date the question arose with the Department of State, presided over by Secretary Hay, and I read the conclusion that the Secretary reached upon this subject, quoting from Mr. Moore's valuable treatise upon international law:

" 'July 19, 1899, the Department of State declined a proposal of the British Government to negotiate a treaty to prevent discriminatory legislation by the several States of the United States, subjecting foreign fire-insurance companies to higher taxes than domestic companies. The reason given for the declination was that the negotiation of such a treaty would probably be futile on account of the indisposition of the people to permit any encroachment upon the exercise of powers of the local legislation.'

"ARE THE PUBLIC SCHOOLS OF CALIFORNIA THE PROPERTY OF CALIFORNIA OR OF THE UNITED STATES?

"Is it necessary for me to say anything further? Are the public schools of California the property of California or the property of the United States? Does the public school system of California or of any other State belong to the State that creates and supports it, or to the Government that has neither created nor sustained it? Does this subject come within the treaty-making power? Does it come within the delegated powers of the Constitution? Has the United States the right to incorporate into a treaty a provision that the States shall, out of their own treasury, educate the citizens of foreign governments? Is there any power in any treaty to deprive any of the States of their reserved right to regulate and manage their local affairs according to their own usages and statutes? Are not foreign governments that deal with us presumed to know the nature and the character of our institutions, and is not this principle fully established by an unbroken line of precedents passed upon by the State Department from time immemorial? There can be but one response to all these inquiries, in my opinion, and as the result of the investigation that I have given to this subject I now assert, in the language of the resolutions, that the public school systems of the States belong to the States along with all of their reserved rights; that the Government has no power whatever to meddle with them or control them, and it was the duty of the President to have informed the Government of Japan as soon as the question arose, no matter what his feelings or sentiments may

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Speaking of the constitutionality of the treaty, he said: "If the treaty-making power of the Federal Government is limited, and if this treaty in conferring on Japanese residents in the United States the right to attend the public schools of a State, exceeds those limits, the Treaty in this respect is unconstitu-

have been, that the subject was entirely without the domain of his jurisdiction.

"THE CONCLUSIONS I HAVE REACHED.

"I shall now, in conclusion, summarize the results that I have reached. I am not here for the purpose of denying to the Government the power to cover by treaty every right, privilege, and concession that comes within the treaty-making power in order to carry out the objects and purposes of this Government as defined in the Constitution. I do not for a moment set up the reserved rights of the States against the exercise of any constitutional power that may be incorporated in a treaty. I admit that the United States can enter into any treaty with any foreign power in reference to any subject embraced in the Constitution. I deny, however, that it possesses any inherent right to make a treaty, and I claim that the treaty-making power lies in grant and not in sovereignty and must be construed *in pari materia* with all the other clauses of the instrument that creates it, and that in interpreting the treaty-making power we must be governed by the principles of international law, its usages and its practices, as those principles, usages, and practices appertain to our form of constitutional government. I utterly deny that we have any right to make a treaty that violates the Constitution, or deprives the States of their reserved rights to conduct their local affairs over which the Federal Government has no jurisdiction, and which they alone have the right to administer according to their own constitutions and statutes.

"THE RESERVED RIGHTS OF THE STATES.

"As I said at the commencement, this is a grave and profound question that we have encountered. The local problem sinks into insignificance beside the great principle that is here involved. It affords a timely warning and admonition that at any time, through the treaty-making power, a deadly blow may be aimed at the entire fabric of our institutions, and they can be leveled to the ground. If the President can practically make a treaty, and that is what he is doing in other directions, and dispose of the reserved rights of the States, then the treaty-making power is above and beyond the Constitution, and the supremacy of the States within their own borders departs and vanishes forever. If the Democratic party accepts such a doctrine as this, then it has also parted with its birthright and abandoned the historic ground upon which it has stood for over a century. I believe in the complete exercise by the Federal Government of every Federal power contained in the Constitution, but beyond the delegated powers and the right to pass all laws necessary to execute the delegated powers, I would never justify the slightest encroachment upon the reserved rights of sovereign States within their own borders. In the

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tional, and no more the supreme law of the land than an unconstitutional act of Congress. The question, 'Can a treaty override the Constitution?' is to-day as absurd as the question, 'Can an Act of Congress override the Constitution?' The treaty-making power, as the legislative power, must be exercised within those limits, if any, imposed by the Constitution."

§ 152. Same subject—Is the treaty-making power limited or unlimited.—Mr. Lewis said that the difficulty in all questions of this character was to determine whether or not the treaty-making power was limited or unlimited. He said: "Is it an unlimited power or is it a limited power; and if limited, what are the limitations? On the answers given to these questions depends the validity of the Japanese Treaty, supposing that that treaty does in terms give the right to Japanese residents in this country to send their children to the public schools of the State in which they reside.

"The discussion of the extent of the treaty-making power is almost wholly an academic one, the Supreme Court having only decided one point; namely, that the treaty-making power of our Federal Government is not confined within the limits of the legislative power of that government. That can be done by treaty which cannot be done by act of Congress."

Referring to the cases in which it was held that a treaty removed the disability of aliens to inherit, he stated: "The conclusion reached from the cases referred to, that under the treaty-making power that can be done which Congress under its legislative power cannot do, is still further strengthened by the long acquiescence of all Departments of the Federal Government, and of the states, in extradition treaties; treaties in which claims of our citizens against foreign governments have been confiscated, barred and satisfied; trade-mark conventions; and treaties giving foreign consuls judicial powers in the United States, or United States consuls judicial power over American citizens in

night of our despair, this reserved right of the States is the only constellation that for our party has no 'fellow in the firmament.' We were born under its horoscope, and if there is any life left in us we must forsake the worship of grotesque and meaningless idols and follow it like a pillar of fire to the land of our nativity.'' 41 Congressional Record, No. 8, pp. 281-288.

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foreign lands. In all these treaties will be found provisions which Congress alone, under its legislative power, could not enact."

"On the other hand no member of the Supreme Court, text-writer, or publicist has yet taken the position that the treaty-making power of our Federal Government is absolutely unlimited."[87]

[87] 55 American Law Reg. No. 2, February, 1907. Speaking of the clause relating to the treaty-making power he said: "The three main articles of the Constitution deal respectively with the legislative, executive and judicial departments. The clause conferring treaty-making power is in the second Article. This Article provides that the President 'shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.' The Constitution does not specify the subjects in regard to which treaties may be made. The words are general; the President and the Senate have the power to make treaties. There is a marked difference in this respect in the manner in which the second Article confers the treaty-making power and the way in which the first Article confers the power of legislation. The first Article, after providing for the creation of a legislative body, confers on that body, not the power to legislate, but the power to legislate on particular subjects which are carefully enumerated.

"The powers conferred by the first Article are on their face legislative powers only. They neither purport to give nor take away any power which the President and the Senate may possess in respect to treaties. This fact is the justification for the decisions of the Supreme Court to which reference has been made. Shortly after the Constitution was adopted, when the Jay Treaty with England was under discussion, it was supposed by some that as the first Article conferred on Congress the power to regulate foreign commerce, under the treaty-making power no commercial treaty could be negotiated. It was soon perceived, however, that regulations of foreign commerce could be the result either of an act or a treaty, and that while the first Article had conferred on Congress legislative power which enabled them to regulate foreign commerce, that did not prevent the treaty-making power from being so exercised as to produce the same result. Since then the proposition that the treaty-making power of our Federal Government is neither enlarged or contracted by the grants of legislative power in the first Article has never been seriously questioned. Taking these first two Articles of the Constitution by themselves, it is as clear that general treaty-making power is conferred in the second Article, as it is that limited legislative power is conferred in the first Article. If it be objected that the Constitution does not in express terms give to the Federal Government power to make any treaty it sees fit, it can be replied, that where those who are sovereignty, as the power of legislation or the power to make a treaty, the word 'all' is not necessary to explain the extent of the power. The power to do

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§ 153. Same subject—Limitation by words of constitution.—Mr. Lewis having pointed out that the treaty-making power is not limited by the nature of the power, states that it is limited by the words of the Constitution, because the Constitution creates a government with three separate departments—executive, legislative and judicial—and that it is axiomatic that powers conferred upon one cannot be exercised to alter the Constitution, and quotes the language of Judge Story: "A power given by the Constitution cannot be construed to authorize a destruction of the other powers given by the same instrument. . . . . A treaty to change the organization of the government or annihilate its sovereignty, to overturn its republican form or to deprive of

something given by a sovereign hand is the power to do it in any way the grantee sees fit. The argument that because the word 'all' does not precede the word 'power' in the clause conferring treaty-making power and that therefore the power is limited, proves too much. It would show that the words in the second Article do not confer a power to make a treaty on any subject. Not only is the word 'all' not used, but none of the subjects on which treaties may be negotiated are referred to.

"As in apparently unambiguous language full and unlimited treaty-making power is by the second Article conferred on the President and the Senate, the burden is on those who contend that the power is limited to prove their case. For we must remember that if the Constitution does attempt to give to the President and Senate an unlimited power to make treaties, the attempt has been successful. There have been two theories in regard to the adoption of the Constitution of the United States; one that it was adopted by the people of the United States; another that it was adopted by the States. The advocates of either theory, however, agree that the power which adopted the Constitution was competent to confer on the Government created by the Constitution all the powers of sovereignty. The source from which the Constitution sprang is a source of unlimited power and authority. The people or the States who adopted it could give to the new Government that they created just as much or just as little of the powers of sovereignty as they chose.

"Limitations on the treaty-making power, if any exist, may be found, either in the nature of the power, or the words of the Constitution. Again, limitations may possibly be implied from the fact that our Constitution was adopted by a free people, or may be implied from the very existence of the States as an integral part of our Federal State.

"A moment's consideration will show that there is nothing in the nature of the power which limits its operations to particular classes of subjects. A treaty is a contract between two nations. Treaties, if not essential to foreign social and commercial intercourse, are at least an important means of fostering such intercourse. The people of a nation

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its constitutional powers, would be void, because it would destroy what it was designed to fulfill the will of the people."[88]

Mr. Lewis continued: "The treaty-making power, as all other powers of our Federal Government, is necessarily limited to the extent here indicated. By treaty we may not alter the Constitutional distribution of powers between the three Departments of our Federal Government, or confer on any Department a power not conferred on it by the Constitution. By treaty we may not agree that hereafter Congress should legislate on divorce, or that the treaty-making power itself should be executed by Congress; or that a particular State should have three representatives in the Senate.

"If a treaty cannot alter the Constitution as written, a treaty cannot violate any specific general restriction on Federal power which may be found in the Constitution. The first eight Amendments, for instance, are prohibitions against specific exercises of power. In all except the first, the prohibition is in terms general. The second Amendment does not say that 'Congress shall not pass any law' forbidding the people to bear arms, or that 'the executive shall not interfere with this right,' but that 'the right of the people to keep and bear arms shall not be infringed.' A treaty which deprived the people of this right would be apparently in direct violation of the express words of the Constitution.

"It is, however, important to note that the 10th Amendment does not limit the treaty-making power. This Amendment provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to

regulate their conduct toward each other by those customs to which they have given the force of law, and by legislation; but much of their conduct towards the people of another nation must be regulated by treaty. Thus, the binding rules of conduct of any people spring from three sources, custom, legislation, and treaties. There is nothing in the nature of any of these sources of law which prevents any particular law from having its origin in any one of them. The wisdom of the contract expressed in the treaty is for the sovereign nations who are parties to it to consider. Being sovereign, the power to contract knows no legal limits. If, therefore, full and unlimited treaty-making power is given to the Federal Government, by treaty anything can be done. There is nothing in the nature of the power to limit the subjects on which treaties can be made."

[88] 55 Am. Law Reg. No. 2, citing Story on Constitution, sec. 1506.

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the States respectively, or to the people.' But the power to make treaties is expressly given to the United States by the Constitution, and the Constitution also expressly prohibits the States from exercising the treaty-making power. The power to make treaties, therefore, is not one of the powers 'reserved to the States respectively, or to the people,' mentioned in this Amendment."

§ 154. **The tenth amendment.**—In the argument of this question by law-writers it was asserted by those who claimed that the treaty-making power could not extend to the subject of education that such a treaty would violate the tenth amendment of the Constitution. Referring to this proposition, Mr. Lewis stated: "Again, it is important to note that the principle that a treaty cannot alter the Constitution as written cannot be extended to prohibit treaties dealing with subjects not referred to in the Constitution. It may be that there are limitations on the treaty-making power, arising out of the fact that the Constitution was adopted by a free people, or from the very existence of the states as a necessary part of the Federal system. But such limitations, if they exist, do not come from the words of the Constitution. For instance, it is admitted that a treaty which conferred on Congress the right to regulate marriage and divorce would be unconstitutional. But whether the marriage of aliens in the United States could be regulated by treaty is a radically different question. If the treaty-making power cannot deal with the subject of the marriage of aliens in the United States, it is not because of anything expressed in our Constitution. The Constitution confers on Congress legislative power over certain subjects. The marriage and divorce of natives or aliens in a State of the United States is not a subject on which Congress has been given power to legislate. To confer such power on Congress by treaty would alter the Constitution as written. But to regulate divorce by treaty does not alter the Constitution as written. As has been pointed out, the Constitution gives to the President and the Senate the power to make treaties. It does not say that the marriage and divorce of aliens in the United States shall not be regulated by treaty. There is no clause in the Constitution which such a treaty would violate. To say that we have not given the power to legislate on divorce to Congress

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and therefore that it may be presumed that it was not intended to confer on the President and Senate the power to regulate the subject by treaty, is to take the position that the grants of legislative power limit the treaty-making power; a position which has been, as we have seen, expressly repudiated by the Supreme Court. If, therefore, there is no power to make a treaty on the subject, the want of power must be due, not to anything expressed in the Constitution, but to some implied limitation on the treaty-making power.

"The principles on which we would have to test the validity of a treaty on the marriage and divorce of aliens in the United States also applies to the Treaty under discussion. Admitting that our Treaty with Japan provides that Japanese residents shall have a right to attend the public schools of a State, it is evident that such treaty does not violate any clause of the Constitution as written. Such a treaty does not confer on Congress legislative power over the State schools. It does not increase or decrease legislative or executive power as found in the Constitution or violate any of its express prohibitions. The right of the Federal Government to adopt a treaty of the character indicated can only be denied by showing that such a treaty violates an implied limitation on the treaty-making power." [89]

[89] 55 Am. Law Reg. No. 2. He proceeded: "The people of the United States are organized in a Federal State. An implied limitation on a power delegated to the Federal Government must arise out of the existence of some implied reserved right in the people of the United States, or out of the existence of some implied reserved right in the States considered as corporate entities.

"We may first ask: Are there any implied reserved rights of the people of the United States not mentioned in the Constitution. Our Constitution was adopted by a free people and was intended for their government. The first eight Amendments specify certain rights of the people of the United States. The rights specified tend to protect individual liberty and the republican form of government. Following these Amendments, the 9th Amendment provides: 'The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.' The wording of this Amendment presupposed the existence of reserved rights in the people of the United States not mentioned in the Constitution. There are, therefore, implied limitations on the treaty-making power and on every other power of the Federal Government arising out of the fact that the Constitution was adopted by a free people imbued with the importance of individual liberty and firmly believing in democratic institutions. It is unnecessary to discuss

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§ 155. No question of state rights involved.—It was contended that by the provision of the treaty with Japan and its enforcement the question of state rights became involved. Mr. Root, Secretary of State, said that no question of state rights was in-

specific illustrations of possible violations of these implied limitations on the treaty-making power, for a treaty which gives to aliens the right to attend the public schools of a State does not violate any possible rule of law designed to protect the liberty of the citizens of the United States or the republican form of government.

"If the Treaty under discussion does not violate any part of the Constitution as written, or any implied limitation on the treaty-making power arising out of the implied reserved rights of the citizens of the United States, the single question remains: Does it violate any implied limitation on the treaty-making power arising out of implied reserved rights of the States?

"If the treaty-making power is necessarily limited by the nature of a Federal State, then it will be necessary to go outside the Constitution to ascertain the nature of those limitations, and whether they prohibit the Central Government from making the treaty in question. On the other hand if there is nothing in the nature of a Federal State, in which the Central Government has all the treaty-making power, to impose implied restrictions on the subjects which may be dealt with under that power, such an investigation will be unnecessary.

"The broad question whether any limitations on the treaty-making power arise of necessity from the Federal nature of our State has never been thoroughly discussed. But the most important single question which tests the question of the existence of such a limitation on the right of our Federal Government by treaty to cede the territory of a State without its consent, has been the subject of many positive and conflicting assertions. Chancellor Kent in his Commentaries; Justice McLean in Lattimore v. Poteet, and Mr. Butler in his work on the Treaty-making Power, are all of the opinion that such a power exists. On the other hand, Woolsey, in his work on International Law, and the late Justice Field, of the Supreme Court, deny the power.

"The greater power includes the less. If it can be shown that there is nothing in the nature of a Federal State to prevent the treaty-making power from ceding part or all of the territory of a State to a foreign power, there is certainly nothing in the nature of such a State to prevent the subjects of a foreign power from being given by treaty the right to attend the public schools of the State. In the second case a State is merely required to devote a part of its property, set aside for the education of native residents, to the education of foreign residents; but in the first the State itself is destroyed. . . . .

"That our Constitution should carefully guard and limit the legislative power of the Federal Government is most natural. The regulation of interstate, not state commerce; protection to the United States as a nation, not regulations of

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volved, unless it was the question settled by the adoption of the Constitution. To use his own language:

"Legislative power is distributed; upon some subjects the National Legislature has authority; upon other subjects the State

the internal affairs of the States, are objects of the union. General legislative power in the Federal Government was unnecessary to accomplish the ends in view. But the power to deal with foreign nations as a unit; to secure as a unit in time of peace the best commercial treaties possible; as a unit to make war, if war was necessary; and as a unit to make the best peace possible, if peace was necessary; all these were prime objects of the Union, and they are objects which cannot be obtained by conferring a treaty-making power limited and fettered in the way it was both wise and feasible that the Federal legislative power should be fettered. Take even the power to part by treaty with the territory of a State. The probability that the new nation would sooner or later be engaged in war was present to the minds of those who adopted our Constitution. Wars are ended by treaties of peace. The spectacle of a nation being obliged to purchase peace by the cession of territory is not rare. Before, as well as since, the adoption of our Constitution, other nations have often had to purchase peace by the cession of territory. Germany demanded Alsace and Lorraine as the price of withdrawing their troops from Paris. The experience of France is not unique. Though we are now a powerful nation removed probably for many decades to come from the fear of foreign invasion, we have in the course of our short history seen a foreign power in possession of our national capital. If by entering a union with other States, a State renders it legally possible for the Central Government to sacrifice her territory or her complete control over her police arrangements to protect the territory of other States, she also gains the reciprocal advantage of being able to save herself and the great majority of the other States by sacrificing the territory of a sister State. Such an arrangement is not one-sided.

"Take the specific case under consideration. The power to admit or exclude aliens from the territory of a State unquestionably resides in our Federal Government. The Federal Government has the exclusive power of naturalization. When the States have already given to the Central Government the power to admit aliens and make them citizens, entitled to all the rights and privileges of citizenship, there is nothing unreasonable in their also conferring on that government the power to give aliens, after admission to a State and before naturalization, the right to be admitted to her public schools. . . . .

"If these conclusions are correct, our Federal Government has under the Constitution power to make a treaty with Japan or any other foreign nation, giving to the subjects or citizens of the foreign nation residing in one of the States the right to attend the public schools of the State on the same terms as native or naturalized citizens. In the Constitution itself we find nothing to restrain the President from negotiating, with two-thirds of the Senate

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Legislature has authority. Judicial power is distributed; in some cases the Federal courts have jurisdiction; in other cases the State courts have jurisdiction. Executive power is distributed; in some fields the National Executive is to act; in other fields the State Executive is to act. The treaty-making power is not distributed; it is all vested in the National Government; no part of it is vested in or reserved to the States. In international affairs there are no States; there is but one nation, acting in direct relation to and representation of every citizen in every State. Every treaty made under the authority of the United States is made by the National Government, as the direct and sole representative of every citizen of the United States residing in California equally with every citizen of the United States residing elsewhere. It is, of course, conceivable that, under pretense of exercising the treaty-making power, the President and Senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power; but so far as the real exercise of the power goes, there can be no question of State rights, because the Constitution itself, in the most explicit terms, has precluded the existence of any such question."[90]

from ratifying such a treaty. It is not opposed to the fundamental characteristics of free republican government; it does not interfere with the liberty of the citizens of the United States; and finally, there is nothing in the nature of our Federal State from which we may imply any limitation on the treaty-making power not found in the words of the Constitution."

[90] Address before the American Society of International Law at Washington, April 19, 1907. In the Columbia Law Review of March, 1907, Vol. VII, No. 3, appeared an article written by Arthur K. Kuhn, entitled "The Treaty-making Power and the Reserved Sovereignty of the States." Among other things he said:

"It is not the purpose of this paper to discuss the merits of this controversy. In its present stages it is important only because it points out that the *limitations* upon the treaty-making power have never been authoritatively defined and that the precedents are so few as to leave the question an open one as to whether there are any limitations at all, other than those imposed upon the treaty-making power of most other countries. If, however, owing to the peculiar structure of our political system, such limitations do exist, it is plain that the consequences may be serious; for the Federal Government may either find itself incapable of maintaining the integrity of a compact regularly entered into with

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§ 156. Implied limitations upon treaty-making power.—While Mr. Root claimed that there were no express limitations upon the treaty-making power granted to the national government, he ad-

some foreign power for the benefit of citizens or subjects of that power residing or sojourning in the United States, or as a corollary, it may find that it is powerless to enforce reciprocal provisions protective of or beneficial to our own citizens residing or sojourning within the territory of that power.

"An example of the first case was presented by the incident known as that of the Mafia Riots, which occurred in 1891, and which resulted in a withdrawal from Washington of the Italian Minister accredited to the United States. In that year, a number of Italians then confined in New Orleans were forcibly taken from jail and hanged by a large number of citizens. None of the participants was tried, though the then existing treaty (November 23d, 1871) guaranteed to the citizens of either nation in the territory of the other 'the most constant protection and security for their persons and property.' Neither was any compensation possible under the laws of the State of Louisiana owing to the fact that the common civil law prevailed in that State pursuant to which no action lay for injury to a person, resulting in his death. Under the position taken by Mr. Blaine, then Secretary of State, the Federal Government was powerless to 'do more than urge upon the State officers, the duty of promptly bringing the offenders to trial.' . . . .

"We think that the issue was thus very clearly brought out, but it was not settled at the time because, following the usual practice, the Federal courts evaded the question of the capacity of the treaty-making power to impress upon the laws of a State a provision within its police powers, and therefore otherwise reserved, in favor of aliens, in exchange for reciprocal benefits to our own citizens within the territory of the foreign state. Instead, the decision went off on a point of the interpretation of the treaty. Furthermore, the Federal Government finally avoided further conflict with Italy by offering to her a sum of money to be distributed among the families of the victims, though the letter offering this indemnity disclaimed any liability on the part of the United States Government. . . . .

"These examples from the diplomatic relations of the United States with other powers are cited to show the situation presented by the peculiarity of our organic law. The war spirit which pervaded both countries at the time of the incident with Italy and the energetic measures employed in the President's recent message to Congress to quell a recurrence of it on either side of the Pacific because of the incident with Japan, indicate the importance of having a clear definition of the treaty-making power under our Constitution. A strongly centralized nation such as Italy or France, or as we have seen even our own government when in the position of the complainant, will never submit without a struggle to the avoidance of treaty obligations on the plea of *ultra vires*. Neither will the opportunist methods of diplomacy forever prove adequate. Mr. Blaine adopted the attitude of the overzealous attorney

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mitted that there were certain implied limitations arising from the nature of the federal government and from other provisions of the Constitution, but he asserted that these limitations did not

defending his client from a money claim for injuries and finally compromised on the best basis possible. This will not do, for, as the case of the Montijo proves, the shoe has been, and again may be on the other foot. . . . .

"In respect of categories of legislation enumerated in the Constitution, there can be no dispute as between the authority of the treaty-making organs and the States. Here at most there may arise the question whether there has been a usurpation of the legislative powers of Congress. Though not within the limitations of the present paper, we may say that even as far back as 1840 Mr. Calhoun recognized that even the exclusive delegation of a power to Congress does not exclude it from being the subject of treaty stipulations. Of this the power of appropriating money furnishes a striking example. If the contrary should be maintained, it might truly be said that the exercise of the treaty-making powers has been 'one continual series of habitual and uninterrupted infringements of the Constitution.'

"Of all the movements toward centralization by construction and interpretation, which have been progressing since the formation of the Federal Union, none would seem more necessary for the preservation of the whole than the tendence toward a liberal construction of Article VI of the Constitution. Even in the Convention, the necessity for the widest delegation of these powers was recognized. Madison pointed out that the violation by the States, as separate entities, of treaties passed under the old Articles of Confederation had already resulted in complaints from almost every nation with which treaties had been formed. It is plain from the discussion which ensues that the provision was adopted in its present form in order to prevent any part of the nation from causing a rupture between a foreign nation and the whole. It is significant that after a full discussion in the Convention, the only restraints placed upon a treaty-making power were as to the method in which treaties must be made and ratified, and that those restrictions related only to the method of exercising the power and not to its scope or supremacy.

"From the very nature of our government, the treaty-making power must reside centrally or nowhere. If there be a limitation upon the power of the President and Senate to enter into a particular treaty, the power of the entire nation has been by so much cut down.

"For all practical purposes of negotiation with a foreign nation, there is no residue of such power left anywhere. Adopting the reasoning of Mr. Butler, now Reporter of the Supreme Court of the United States, we may say that as to those subjects over which it was neither proper nor practical, for a State to exercise sovereignty, but which required national action for the joint or equal benefit of every State, it was impossible for any State separately, or all the States collectively, either to delegate or reserve elements of sovereignty which none of them possessed.

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to the slightest extent affect the execution of treaty stipulations relating to the treatment of aliens within the United States. He referred to the declaration of the supreme court of the United States that the treaty-making power extends to all proper subjects of negotiation between our government and the governments of other nations, and that, as expressed in the Constitution, it is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself, and of that of the states, and that with the exception of not authorizing what the Constitution forbids, nor authorizing a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of a state without its consent, "it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."[91]

"Whatever may have been the intention of the framers of the Constitution in respect of the reserved powers of the States within the category of national or State law, it could never have been (and the debates in the Convention so prove) to limit the central government in the exercise of its international power as a sovereign to protect and benefit the citizens of *all* of the States in foreign countries, and for that purpose, to assure reciprocal rights to aliens in all of the States. It is clear that as a practical matter the one power follows as a corollary of the other. If it has the power to obtain the *right* in behalf of our own citizens, it has the power to pledge the faith and honor of the nation for the performance of the *quid pro quo* as an *obligation* upon all of the States. If it be said that thus a treaty may be made the subterfuge for imposing undesired legislation upon the States, it may be answered that besides the numerous political checks provided for in our system, the Supreme Court has ample authority to review the exercise of the constitutional prerogative just as it does in respect to an excess by Congress and the President, in the exercise of one of the expressly delegated powers.

"But with these exceptions, the unrestricted exercise of the treaty power is essential to the Central Government as representing the nation and its sovereignty over and against foreign nations. It is wholesome because it tends to prevent war. It is consistent because Article I, Section 10, expressly denies all treaty power to the States without the consent of Congress and further because all of the States are equally represented in the ratifying body, wherein two-thirds must concur. International, not municipal, standards of law should determine its scope and the limitations of its use."

[91] In De Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. Rep. 295, 33 L. ed. 642, Mr. Root's Address before

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§ 157. **Same subject—Mr. Root's views.**—Mr. Root stated that among the most familiar, ordinary and unquestioned exercises of the treaty-making power are reciprocal agreements between nations relative to the treatment which the citizens of each nation

American Society of International Law, April 19, 1907. Judge Schackleford Miller, of Louisville, Kentucky, delivered a lecture before the Jefferson School of Law, in which, after citing the clause in the treaty relating to residence, he said: "It will no doubt readily be conceded that the right of the Japanese students to attend the public schools must be founded upon this treaty right of residence or it does not exist. There is no other right or privilege mentioned in the treaty which could even be remotely claimed to embrace the right of attending the public schools. It would seem, however, that a fair construction of the treaty would scarcely extend the privileges of the public schools of a State to unnaturalized foreigners. If the Federal Government had so intended, it is but reasonable to assume that the treaty would have so provided in express terms. It was careful to cover the rights of entry, travel, residence, the succession of personalty, and the disposition of property of all kinds, but it nowhere appears that school privileges were ever considered.

"Under the present treaty, therefore, it would seem reasonably clear that the Japanese residents of California have no right to have themselves and their children educated at the public schools and at the public expense."

In an article entitled "The Segregation of Japanese Students by the School Authorities of San Francisco," by Charles Cheney Hyde, published in the Green Bag, Vol. XIX, No. 1, January, 1907, it is said: "It is a benefit to the alien resident in the United States that whenever he may believe that his rights under a treaty are infringed by the act of a single state he may secure a judicial interpretation of the treaty by a competent tribunal. The fact that such an inquiry may be made by a court which is independent of the political department of the government, and free to consider the question of infringement on its merits, is a means of protection to the foreigner. If his contention is sustained, the court, in pursuance of a constitutional provision, will pronounce null and void, and therefore inoperative, any local ordinance or state law which it finds to be in violation of the treaty. Because this means of redress is open to the alien, the United States is justified in requiring that an alleged violation of a treaty by the act of a state should be made the subject of judicial inquiry in an American court before being asserted as a ground for diplomatic intervention. Such has been our constant practice.

"In a note to the Chinese Minister, May 27, 1890, the Secretary of State, Mr. Blaine, in reply to a protest from the Chinese government against an ordinance of San Francisco, requiring Chinese subjects there residing to remove from their existing homes and places of business to a particular part of that city, as a violation of Article III of the treaty of 1880 said:

"'Meanwhile, may I ask your attention to the sixth article of the Constitution of the United States, which

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shall receive in the territory of the other. "To secure the citizens of one's country against discriminatory laws and discriminatory administration in the foreign countries where they may travel or trade or reside is, and always has been, one of the chief

places treaties on the same juridical basis as laws and makes them the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. By the second section of the third article the judicial power of the United States is made to extend to all cases arising under the treaties. Under these provisions, and the statutes of the United States passed to give them effect, it is believed that the Chinese who are said to have been arrested under the order in question may, in an application to the courts for release from imprisonment or detention, speedily obtain a decision as to their rights and the legality of the order.'

"Advantageous as it may be from every point of view, both to the alien and to our own government, that an American tribunal should determine whether a foreigner residing in the United States has been prevented from enjoying the exercise of a treaty right, it cannot be said that the decision of such a question by such a tribunal can fully determine the rightfulness of the claim advanced. When the decision of the court denies the contention of the alien, his government is not bound by the judicial interpretation of the treaty. If, for example, the federal courts should decide that the action of the school authorities of San Francisco was not in contravention of the treaty of 1894 with respect to Japanese subjects there residing, the Emperor of Japan would not be under any obligation to accept the decision as decisive of the rights of his subjects. This exact situation was forcibly commented on by Mr. Blaine in writing to Mr. Comly in Hawaii, June 30, 1881:

"'I am not aware whether or not a treaty, according to the Hawaiian Constitution is, as with us, a supreme law of the land, upon the construction of which—the proper case occurring—every citizen would have the right to the judgment of the courts. But, even if it be so, and if the judicial department is entirely independent of the executive authority of the Hawaiian government, then the decision of the court would be the authorized interpretation of the Hawaiian government, and however binding upon that government would be none the less a violation of the treaty. In the event, therefore, that a judicial construction of the treaty should annul the privileges stipulated and carried into practical execution, this government would have no alternative and would be compelled to consider such action as the violation by the Hawaiian government of the express terms and conditions of the treaty, and, with whatever regret, would be forced to consider what course in reference to its own interests had become necessary upon the manifestation of such unfriendly feeling.'

"It is not unreasonable for a state to feel itself free from any obligation to yield to the interpretation given to the provisions of a treaty by a local tribunal of the other contracting party. The right of a court to do justice between nations—to render, for example, a decision as to the meaning

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objects of treaty making, and such provisions always have been reciprocal. During the entire history of the United States, provisions of this description have been included in our treaties of friendship, commerce, and navigation with practically all the other nations of the world. Such provisions had been from time immemorial the subject of treaty agreements among the nations of Europe before American independence; and the power to make such provisions was exercised without question by the Continental Congress in the treaties which it made prior to the adoption of our Constitution." He said that it was not open to doubt that when the delegates from the thirteen states "conferred the power to make treaties upon the new National Government in the broadest possible terms and without any words of limitation, the subjects about which they themselves had been making treaties then in force were included in the power."[92]

of a treaty, and which shall be legally binding on the signatories thereto, must be founded on their mutual consent. This fact is now generally appreciated by civilized states. It is one of the reasons why nations are willing to agree that disputes concerning the interpretation of treaties, and which cannot be adjusted through diplomatic channels, may be referred to international courts of arbitration, such as the permanent Tribunal at The Hague.

"On the other hand, by reason of the learning and integrity of the Supreme Court of the United States, and, therefore, on account of the strong probability that its interpretation of the treaty of 1894 would be the true interpretation, and such as an international court of arbitration would render under similar circumstances, it is not unlikely that the Japanese Government would yield to the decision of that tribunal and admit the correctness of its views. In the present controversy, therefore, it is not to be anticipated that a decision by the highest court of the United States adverse to the contentions of Japan would be regarded by that government as arbitrary or unreasonable, or as not decisive of the rights of the high contracting parties."

[92] He called attention to the treaties of 1778 with France and of 1782 with the States-General of the United Netherlands, and of 1785 with Prussia, ratified by the continental Congress on May 17, 1786. He quoted the language of Mr. Bancroft Davis, summarizing the provisions of the Prussian treaty: "The favored nation clause put Prussia on the best footing in the ports of Charleston, Boston, Philadelphia, and New York, no matter what the legislatures of South Carolina, Massachusetts, Pennsylvania, or New York might say. Aliens were permitted to hold personal property and dispose of it by testament, donation, or otherwise, and the exaction of State dues in excess of those exacted from citizens of the State in like cases were forbidden. The right was secured to aliens to frequent the coasts of each and all the States, and to reside and trade

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§ 158. **Distribution of governmental powers.**—Mr. Root took the view that inasmuch as the rights, privileges and immunities to be given to foreign subjects in the United States and to American citizens in foreign countries form a proper subject of treaty provision within the limits of the treaty-making power, and inasmuch as such rights, privileges and immunities may be accorded in contravention of the laws of any state, it necessarily follows that the treaty-making power alone has the authority to determine what shall be those rights, privileges and immunities. "No state," said he, "can set up its laws as against the grant of any particular right, privilege, or immunity any more than against the grant of any other right, privilege or immunity. No State can say a treaty may grant to alien residents equality of treatment as to property, but not as to education, or as to the exercise of religion and as to burial, but not as to education, or as to education, but not as to property or religion. That would be substituting the mere will of the State for the judgment of the President and Senate in exercising a power committed to them and prohibited to the States by the Constitution.

"There was, therefore, no real question of power arising under this Japanese Treaty and no question of State rights.

"There were, however, questions of policy, questions of national interests and of State interests, arising under the administration of the treaty and regarding the application of its provisions to the conditions existing on the Pacific coast.

"In the distribution of powers under our composite system of government the people of San Francisco had three sets of interests committed to three different sets of officers—their special interest as citizens of the principal city and commercial port of the Pacific coast represented by the city government of San Francisco; their interest in common with all the people of the State of California represented by the Governor and Legislature at Sacramento; and their interests in common with all the people of the United States represented by the National Government at Washington. Each one of these three different governmental agencies had authority to do certain things relating to the treat-

there. Resident aliens were assured against State legislation to prevent the exercise of liberty of conscience and the performance of religious worship; and when dying, they were guaranteed the right of decent burial and undisturbed rest for their bodies."

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ment of Japanese residents in San Francisco. These three interests could not be really in conflict; for the best interest of the whole country is always the true interest of every State and city, and the protection of the interests of every locality in the country is always the true interests of the Nation."[93]

[93] Speaking of the conference with the officials of San Francisco, he said: "There was, however, a supposed or apparent clashing of interests, and, to do away with this, conference, communication, comparison of views, explanation of policy and purpose were necessary. Many thoughtless and some mischievous persons have spoken and written regarding these conferences and communications as if they were the parleying and compromise of enemies. On the contrary, they were an example of the way in which the public business ought always to be conducted; so that the different public officers respectively charged with the performance of duties affecting the same subject-matter may work together in furtherance of the same public policy and with a common purpose for the good of the whole country and every part of the country. Such a concert of action with such a purpose was established by the conferences and communications between the national authorities and the authorities of California and San Francisco which followed the passage of the Board of Education resolution.

"There was one great and serious question underlying the whole subject which made all questions of construction and of scope and of effect of the treaty itself—all questions as to whether the claims of Japan were well founded or not; all questions as to whether the resolution of the school board was valid or not—seem temporary and comparatively unimportant. It was not a question of war with Japan. All the foolish talk about war was purely sensational and imaginative. There was never even friction between the two Governments. The question was, What state of feeling would be created between the great body of the people of the United States and the great body of the people of Japan as a result of the treatment given to the Japanese in this country?

"What was to be the effect upon that proud, sensitive, highly civilized people across the Pacific, of the discourtesy, insult, imputations of inferiority and abuse aimed at them in the columns of American newspapers and from the platforms of American public meetings? What would be the effect upon our own people of the responses that natural resentment for such treatment would elicit from the Japanese?

"The first article of the first treaty Japan ever made with a western power provided:

" 'There shall be a perfect, permanent, and universal peace and a sincere and cordial amity between the United States of America on the one part, and the empire of Japan on the other part, and between their people respectively, without exception of persons or places.'

"Under that treaty, which bore the signature of Matthew Calbraith Perry, we introduced Japan to the world of western civilization. We had always been proud of her wonderful development—proud of the genius of the race that in a single generation adapted

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§ 159. Suits by the government.—For the purpose of enforcing what it deemed to be the rights of the Japanese under the treaty, the United States filed a bill in equity in the circuit court of the United States, in which it alleged that the acts of the school authorities of San Francisco constituted a violation of the treaty, and prevented the United States "from carrying out its treaty obligations to the Empire of Japan and to its citizens and subjects, as is the right and duty of the United States, and imperatively demanded by the national interests." The right of the United States to maintain such a proceeding was based upon the principles announced in the Debs case,[94] holding that a court of equity has jurisdiction to issue an injunction for the purpose of aiding the power and duty of the general government to prevent a forcible obstruction of commerce and of the transportation of the mails. In this case the principle was recognized that while the government may use force to prevent any

an ancient feudal system of the Far East to the most advanced standards of modern Europe and America. The friendship between the two nations had been peculiar and close. Was the declaration of that treaty to be set aside? At Kurihama, in Japan, stands a monument to Commodore Perry, raised by the Japanese in grateful appreciation, upon the site where he landed and opened negotiations for the treaty. Was that monument henceforth to represent dislike and resentment? Were the two peoples to face each other across the Pacific in future years with angry and resentful feelings? All this was inevitable if the process which seemed to have begun was to continue, and the Government of the United States looked with the greatest solicitude upon the possibility that the process might continue.

"It is hard for democracy to learn the responsibilities of its power; but the people now, not governments, make friendship or dislike, sympathy or discord, peace or war, between nations. In this modern day, through the columns of the myriad press and messages flashing over countless wires, multitude calls to multitude across boundaries and oceans in courtesy or insult, in amity or in defiance. Foreign officers and ambassadors and ministers no longer keep or break the peace, but the conduct of each people toward every other. The people who permit themselves to treat the people of other countries with discourtesy and insult are surely sowing the wind to reap the whirlwind, for a world of sullen and revengeful hatred can never be a world of peace. Against such a feeling treaties are waste paper and diplomacy the empty routine of idle form. The great question which overshadowed all discussion of the Treaty of 1894 was the question: Are the people of the United States about to break friendship with the people of Japan? That question, I believe, has been happily answered in the negative."

[94] 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092.

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unlawful interference with interstate commerce and the transportation of the mails, this right did not prevent it from appealing to the courts for a judicial determination of its powers, and for the prevention of a threatened or continuous act, and that the fact that the government has no pecuniary interest in the matter is not a sufficient answer to an appeal for any proper assistance in the exercise of its powers and the discharge of its duties.[95] As said by Mr. Justice Brewer: "Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of these courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interest of all and to prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court."[96] A proceeding in *mandamus* was also brought by the father of a Japanese child who had been excluded from all but the Oriental school, asking that a writ issue reinstating him in the school which he formerly attended. When the controversy was settled by the withdrawal of the resolution objected to, the suits were dismissed.

§ 160. Colored children and the public schools.—The question involved in the Japanese school controversy did not touch the power of the state to legislate for its own citizens and to make distinctions based upon color where equality of rights in substance was not denied. It may be said to be settled law that no constitutional right is violated by the establishment of separate schools for white and colored children.[97] The privileges granted by the law of a state to a child to attend the public schools is not

[95] In re Debs, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092.

[96] In re Debs, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092.

[97] People v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232, affirming 11 Abb. N. C. 187; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330, 10 L. R. A. 823; State v. Maryland Institute, 87 Md. 643, 41 Atl. 126; Roberts v. City of Boston, 5 Cush. 198; State v. McCann, 21 Ohio St. 198; Martin v. Board of Education, 42 W. Va. 514, 26 S. E. 348; Lehew v. Brummell, 103 Mo. 546, 23 Am. St. Rep. 895, 15 S. W. 765, 11 L. R. A. 828; Ward v. Flood, 48 Cal. 49, 17 Am. Rep. 405.

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a privilege that a citizen of the United States possesses as such, and a person on the mere status of citizenship has no right to demand admission into such schools. Still the privilege of an education, in obedience to the provisions of a state constitution, is a legal right to the same extent as a vested right in property.[98]

§ 161. **Same facilities for education to be afforded.**—The legislature, in creating a system of education for the children of the state, cannot exclude colored children from the benefits of such system because of their African descent merely, but a law which provides for the education of children of African descent in separate schools is not in conflict with the Constitution. The separate schools, however, should afford the same facilities for education.[99]

The question in the Japanese school case was (assuming that a privilege of residence included the right of education), Could the national government, by treaty, guarantee that the subjects of the treaty-making power should be placed on the ground of equality with other aliens and not discriminated against on the assumption of racial inferiority? In this connection it might be urged that an alien would have a better right or a different right than one native-born, because the latter, on account of color, might be sent to a different school. But even if this were so, it all comes back to the proposition whether a treaty may not suspend the power of the state to legislate in any manner obnoxious to the treaty.

A state court may refuse, on grounds of public policy, to apply the doctrine of comity so as to subject by attachment to the payment of an indebtedness due a German corporation from a German subject a fund within the state to which one of its own citizens asserts a claim, where the effect of such action would be to remove the fund to a foreign country, to be administered in favor of the foreign creditors.[100]

[98] Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405.

[99] Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405.

[100] Discontento Gesellschaft v. Umbreit, decided February 24, 1908, 9 Advance Sheets, U. S. Sup. Ct. Opinions, 337.

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CHAPTER VIII.

CONFLICT BETWEEN TREATIES AND ACTS OF CONGRESS.

§ 162. Treaties supreme law of land.
§ 163. History of clause.
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§ 189. Right to return.
§ 190. Power of state to exclude.
§ 191. Construction of exclusion laws.
§ 192. Conclusiveness of decision of department.
§ 193. Hearing arbitrarily denied.

§ 162. Treaties supreme law of land.—The Constitution declares that treaties shall be the supreme law of the land. The clause on this subject is: "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the

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judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."[1]

§ 163. **History of clause.**—When the constitutional convention had assembled, Governor Randolph, of Virginia, on May 29th offered a series of resolutions for the consideration of the convention, which became known as the "Virginia plan," and in relation to treaties contained this clause: "The national legislature ought to be empowered . . . . to negative all laws passed by the several states, contravening in the opinion of the national legislature, the Articles of Union, or any treaty subsisting under the authority of the Union." Much discussion took place in the convention over this clause, it being objected that the states would become disgusted, and Luther Martin stated that he considered the clause improper, and inquired whether the laws of the states were to be transmitted to the general legislature before they could become operative. By others the provision was thought necessary, and it was urged that unless a negative power existed, the propensity of the states to disarrange and embarrass the system could not be restrained. The clause was defeated by a vote of seven to three, and then the following resolution introduced by Luther Martin was adopted: "That the legislative acts of the United States, made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, so far as these acts or treaties shall relate to the said states, or their citizens and inhabitants; and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding."[2] The proposition, although adopted, was referred to the Committee on Detail, who reported the provision thus:

"Article VIII. The acts of the legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several states, and of their citizens and inhabitants; and the judges in the several states shall be bound thereby in their

[1] Art. VI, cl. 2.

[2] 1 Elliot, 207, V, 322.

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decisions, anything in the constitutions or laws of the several states to the contrary notwithstanding."

When the convention took up the clause for consideration, it amended it by inserting the word, "Constitution," and by changing the words "acts of the legislature" to "laws," so that in its amended form it read: "This Constitution, and the laws of the United States made in pursuance thereof, and all the treaties made under the authority of the United States, shall be the supreme law of the several states, and of their citizens and inhabitants; and the judges of the several states shall be bound thereby in their decisions, anything in the Constitutions or laws of the several states to the contrary notwithstanding."[3]

§ 164. Pre-existing treaties.—Later the clause was amended by inserting the words "or which shall be made" after the words "all treaties made," for the purpose of removing any doubt that might exist as to the application of the clause to pre-existing treaties, by using language that covered both past and future treaties. The clause was then referred to the "Committee on Style," who struck out the words "in their decisions" after the words "bound thereby"; substituted the words "in every state" for the words "of the several states"; before the word "made" after the words "United States" inserted the words "which shall be," and substituted the phrase "supreme law of the land" for the phrase "supreme law of the several states, and of their citizens and inhabitants." This left the clause in the form in which it now appears in the Constitution. The convention rejected a proposition that "no treaty should be binding on the United States unless ratified by law."[4]

Mr. George Ticknor Curtis, speaking of the amendment to this clause, to make the Constitution, and the laws passed in pursuance of it, the supreme law of the land, binding upon all judicial officers, says: "It is a remarkable circumstance that this provision was originally proposed by a very earnest advocate of the rights of the States—Luther Martin. His design, however, was to supply a substitute for a power over State legislation, which had been embraced in the Virginia plan, and which was to be

[3] 5 Marshall's Life of Washington, 654.

[4] 5 Marshall's Life of Washington, 654-658.

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exercised through a negative by the national legislature upon all laws of the States contravening, in their opinion, the Articles of Union or the treaties subsisting under the authority of the Union. The purpose of the substitute was to change a legislative into a judicial power, by transferring from the national legislature to the judiciary the right of determining whether a state law supposed to be in conflict with the Constitution, laws, or treaties of the Union should be inoperative or valid. By extending the obligation to regard the requirements of the national Constitution and laws to the judges of the state tribunal, their supremacy in all the judicatures of the country was secured. This obligation was enforced by the oath or affirmation to support the Constitution of the United States; and, as we shall see hereafter, lest this security should fail, the final determination of questions of this kind was drawn to the national judiciary, even when they might have originated in a state tribunal."[5]

§ 165. Under the authority of the United States.—It will be observed that in this clause of the Constitution it is declared that all laws which shall be made "in pursuance" of the Constitution shall be the supreme law of the land, but that as to treaties, the language is, "All treaties made, or which shall be made, *under the authority of the United States* shall be the supreme law of the land." The explanation given for this difference of phraseology is that at the time the Constitution was adopted, certain treaties were in existence which had been entered into by Congress under the confederation, and it was desired to declare their continuing obligation. By using the phrase "under the authority of the United States," treaties previously made were placed on the same footing as those that might be made after the adoption of the Constitution, as such former treaties could not properly be described as made pursuant to a Constitution which had not yet been adopted.[6]

"The power to make treaties and to send ambassadors and other public ministers and consuls are essential attributes of national sovereignty, and of that international equality which the interests of every sovereignty require it to preserve. Both

[5] Curtis' Constitutional History of the United States, 2d ed., p. 554.

[6] Rawle's A View of the Constitution of the United States, 1st ed., p. 58, 2d ed., p. 65.

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powers were possessed by Congress under the Confederation, but not to the extent to which they are now enjoyed; for then the former power was embarrassed by an exception, under which treaties might be substantially frustrated by regulations of the States, and the latter did not comprehend 'other public ministers and consuls.'

"As treaties with France and Holland, and especially the treaty of peace with Great Britain, existed, it became necessary to vary its terms in regard to treaties, from those relative to the laws of the United States; the declaration it contains in respect to the supremacy of the latter operating only in future, while in reference to the former the terms are, 'All treaties made, *or which shall be made*, under the authority of the United States, shall be the supreme law of the land.' These terms were intended to apply equally to previously existing treaties, as well as to those made subsequently to the Constitution; and it has, accordingly, been adjudged by the Supreme Court that they effectually repeal so much of the State laws and Constitutions as are repugnant to them."[7]

§ 166. Construction of clause.—The Constitution declares that all treaties made under the authority of the United States shall be the supreme law of the land. In an early case the supreme court of the United States was called upon to construe this clause. In 1796 it decided that by the treaty of peace made between Great Britain and the United States, on September 3, 1783, the law of Virginia sequestering British property was nullified. Under this statute a debt due before the war from an American to a British subject was, during the progress of the war, paid into the loan office of Virginia. The treaty, it was held, destroyed the payment made under the statute, revived the debt, and gave a right of recovery against the principal debtor.[8]

It was conceded that the legislature of Virginia had power to enact such a law because from the 4th of July, 1776, to the formation of the confederation, the American states possessed and exercised all the rights of independent governments, but the

[7] William A. Duer's A Course of Lectures on the Constitutional Jurisprudence of the United States, 2d ed., Lect. VIII, p. 227.

[8] Ware v. Hylton, 3 Dall. 235, 1 L. ed. 568.

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treaty under the provisions of the Constitution declaring treaties to be the supreme law of the land, it was decided, superseded the act.[9]

§ 167. **Treaty is equivalent to an act of Congress.**—While it is true that a treaty is the supreme law of the land, it is not supreme in the same sense as is the Constitution itself. A treaty is equivalent in legal effect to a law of Congress, and a subsequent act of Congress will repeal or annul a prior treaty, as will a subsequent treaty annul a prior act of Congress, where there is a conflict. From the very nature of the Constitution a treaty cannot alter it, nor can a treaty be valid if it violates any of its provisions. The Constitution does not attempt to settle the effect of treaties when they conflict with acts of Congress, but the courts have uniformly announced the rule that a treaty may supersede a prior act of Congress, or an act of Congress may supersede a prior treaty.[10]

§ 168. **Treaty is a contract.**—A treaty is essentially a contract between two independent nations. If one of the contracting parties violates the stipulations of the treaty, a remedy for the violation must be sought by the party injured by reclamations upon the other, and the courts cannot determine whether the nation alleging a breach of treaty obligations has just cause of complaint. The validity of a law clear in its provisions cannot be assailed before the courts on the ground that it does not conform to the stipulations of a prior treaty.[11] No superior efficacy can

[9] Ware v. Hylton, 3 Dall. 235, 1 L. ed. 568. Said Mr. Justice Chase: "I apprehend that the treaty of peace abolishes the subject of the war, and that after peace is concluded neither the matter in dispute nor the conduct of either party, during the war, can ever be revived or brought into contest again. All violences, injuries, or damages, sustained by the government, or people of either, during the war are buried in oblivion; and all these things are implied in the very treaty of peace; and therefore not necessary to be expressed."

[10] The Cherokee Tobacco, 11 Wall. 616, 20 L. ed. 227; Ward v. Race Horse, 163 U. S. 511, 16 Sup. Ct. 1078, 41 L. ed. 246; North etc. S. S. Co. v. Hedden, 43 Fed. 22; Clark v. Bates, 1 Dak. 50, 46 N. W. 512; Bartram v. Robertson, 21 Blatchf. 214, 15 Fed. 214; Minnesota Canal & Power Co. v. Pratt (Minn.), 112 N. W. 395.

[11] Whitney v. Robertson, 124 U. S. 194, 8 Sup. Ct. Rep. 456, 31 L. ed. 386.

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be given to a treaty over an act of Congress. It is the endeavor of the courts, if they both relate to the same subject, to give them a construction that will make both effective, if this can be accomplished without violating the language of either. If, however, there is an inconsistency between them, the one last in date will control the other, if the stipulation on the subject in the treaty is self-executing. If the action taken by the legislative department is not satisfactory to the country with which the treaty has been made, it may adopt such measures as it deems proper for the protection of its interests, but it is beyond the powers of the courts to give any redress. The courts cannot determine whether the legislation of Congress was justified or whether the nation complaining has just cause to complain. The decision of questions of this character belong to the diplomatic and legislative departments of the government and not to the judiciary.[12] "So far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal."[13] An act of Congress imposing taxes on distilled spirits and tobacco applies to the country of the Cherokee Nation, and prevails over the treaty with that nation.[14]

§ 169. **Tariff laws and treaties.**—The question as to the effect of tariff laws upon treaty stipulations has frequently arisen, and it has been uniformly held that treaty stipulations, when a conflict arises, are annulled, or perhaps, more correctly speaking, suspended, by the later acts of Congress. The legislative department may place restrictions and obligations upon all who owe obedience to our laws, with the understanding, of course, that the nation, in its character as a nation, may be responsible to another nation for any breach of treaty obligations. The legis-

[12] Whitney v. Robertson, 124 U. S. 194, 8 Sup. Ct. Rep. 456, 31 L. ed. 386; Taylor v. Morton, 2 Curt. 454, Fed. Cas. No. 13,799.

[13] Head Money Cases, 112 U. S. 580, 5 Sup. Ct. Rep. 247, 28 L. ed. 798: A treaty may supersede a prior act of Congress. Foster v. Neilson, 2 Pet. 314, 7 L. ed. 415; and a prior treaty may be superseded by an act of Congress. Taylor v. Morton, 2 Curt. 454, Fed. Cas. No. 13,799; The Clinton Bridge, 1 Woolw. 155, Fed. Cas. No. 2900.

[14] Cherokee Tobacco v. United States, 11 Wall. 616, 20 L. ed. 227.

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lation of Congress, however, must be respected by the courts, and the only question for them to decide is whether a law has been enacted annulling or disregarding the provisions of a treaty. Where such a law has been passed, it must, notwithstanding the treaty, be enforced.

The fourth article of the treaty with Denmark, which was concluded on April 26, 1826, and abrogated, but subsequently revived, with the exception of one article, on the 12th of January, 1858, provided: "No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominions of His Majesty, the King of Denmark; and no higher or other duties shall be imposed upon the importation into said dominions of any article the produce or manufacture of the United States, than are or shall be payable on the like articles being the produce or manufacture of any other foreign country." Under a treaty made with the Hawaiian Islands in 1875, in consideration of reciprocal concessions, sugar imported into the United States was exempt from the payment of duty. It was contended that by virtue of this treaty sugar imported from Danish possessions should also be admitted free of duty; but the court held that the provisions of the treaty with Denmark were pledges that in the imposition of duties upon goods imported into one of the countries which were the produce or manufacture of the other, there should not be any discrimination against them in favor of goods of a similar character imported from any other country, and that while they placed an obligation upon both countries to avoid hostile legislation, they were not intended to prevent the special arrangements with other countries based upon a concession of special privileges.[15]

Likewise it was held that the treaty with the Dominican Republic was never intended to prevent special concessions, founded upon sufficient consideration, permitting the importation of specific articles into this country free from duty.[16] A stipulation in

[15] Bartram v. Robertson, 122 U. S. 116, 7 Sup. Ct. Rep. 1115, 30 L. ed. 1118.

[16] Whitney v. Robertson, 124 U. S. 192, 8 Sup. Ct. Rep. 457, 31 L. ed. 387. Reliance was placed on the ninth article of the treaty with the Dominican Republic: "No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce or manufacture of the Dominican Re-

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a treaty that no higher duties shall be imposed than are placed on goods from other countries is a promise addressed to the political, and not to the judicial, department of the government.[17]

§ 170. Acts admitting states to Union.—The right of Indians to hunt may be revoked by an act admitting a territory to become a state, so that such Indians may be punished for a violation of the laws of the state enacted after its admission.[18] The states have power to regulate matters of internal police. A state, on its admission, is vested with all the rights of dominion and sovereignty possessed by the original states.[19] The power of the state, however, to tax lands of Indians under patents issued to them by virtue of treaties made with their respective tribes may be excluded by the enabling act;[20] and taxes assessed by the laws of a state upon Indian reservations conflicting with their tribal rights as guaranteed to them by treaties with the United States are illegal and void.[21]

public, or of her fisheries; and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article the growth, produce or manufacture of the United States, or their fisheries, than are or shall be payable on the like articles the growth, produce or manufacture of any other foreign country or its fisheries." Mr. Justice Field said that "if there be any conflict between the stipulations of the treaty, and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other." See as to Act of Congress claimed to be in conflict with treaty with Persia, Powers v. Comly, 101 U. S. 789, 25 L. ed. 805; Hadden v. Collector, 5 Wall. 107, 18 L. ed. 518; Sturges v. Collector, 12 Wall. 19, 20 L. ed. 255. See, also, as to discriminating duties as affected by the treaty with Portugal, Oldfield v. Marriott, 10 How. 146, 13 L. ed. 364.

[17] Taylor v. Morton, 2 Curt. 454, Fed. Cas. No. 13,799. See, also, Ropes v. Clinch, 8 Blatchf. 304, Fed. Cas. No. 12,041; Foster v. Neilson, 2 Pet. 314, 7 L. ed. 415. Where it was claimed that a law of Congress relative to custom duties was in conflict with a treaty with Germany, it was held that the act must control, because it was of equal force with the treaty and of later date. North German Lloyd S. S. Co. v. Hedden, 43 Fed. 17.

[18] Ward v. Race Horse, 163 U. S. 511, 16 Sup. Ct. Rep. 1078, 41 L. ed. 246, reversing same case in 70 Fed. 608.

[19] Escanaba etc. Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185, 27 L. ed. 442.

[20] The Kansas Indians, 72 U. S. (5 Wall.) 737, 18 L. ed. 667.

[21] Fellows v. Denniston ("The New York Indians"), 72 U. S. (5 Wall.) 761, 18 L. ed. 708.

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"Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of one of the rights of the states."[22]

§ 171. **Treaties with Indians.**—Subsequent treaties with Indians were considered as modifying a prior nonintercourse law.[23] The act admitting Colorado repealed the treaties with the Utes inconsistent with the act of admission.[24] Notwithstanding the provisions of a treaty, Mexican grants of land in California are not effective without confirmation.[25] The state of Montana, by its enabling acts, obtained jurisdiction over crimes committed by Indians.[26]

The treaty exempting the Osage and Kansas Indian lands from inclusion within any territory or state must yield to the act of Congress creating the territory of Oklahoma, which included such lands within its limits.[27] The law of that territory subjecting to taxation cattle which are kept or grazed on the Indian reservation is not violative of the rights of the Indians, because such taxation is not placed upon the lands or privileges of the Indians.[28]

§ 172. **Acts of admission affecting navigable waters.**—A clause in the act of admission of a state declaring that the navigable

[22] Ward v. Race Horse, 163 U. S. 511, 16 Sup. Ct. Rep. 1078, 41 L. ed. 246, per Mr. Justice White. In that case Mr. Justice Brown dissented, because the opinion of the court seemed to him "to imply and sanction a distinct repudiation by Congress of a treaty with the Bannock Indians."

[23] Clark v. Bates, 1 Dak. 50, 46 N. W. 512.

[24] United States v. McBratney, 104 U. S. 623, 26 L. ed. 870.

[25] Botiller v. Dominguez, 130 U. S. 247, 9 Sup. Ct. Rep. 527, 32 L. ed. 929, citing cases.

[26] Draper v. United States, 164 U. S. 243, 17 Sup. Ct. Rep. 108, 41 L. ed. 420. In a case arising in Oregon, the court conceded that an act of Congress might repeal a treaty, but held that the act of admission should not be construed on account of its silence on the subject as having the effect to modify the treaty. United States v. Bridleman, 7 Saw. 251, 7 Fed. 902.

[27] Thomas v. Gay, 169 U. S. 271, 18 Sup. Ct. Rep. 342, 42 L. ed. 743.

[28] Thomas v. Gay, 169 U. S. 271, 18 Sup. Ct. Rep. 342, 42 L. ed. 743.

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waters within the state shall be free to the United States does not in any manner affect the power which the state might exercise over the subject, if the clause did not exist.[29]

"The act admitting California," said Mr. Justice Field, "declares that she is admitted into the Union on an equal footing with the original states *in all respects whatever*. She was not, therefore, shorn, by the clause as to navigable waters within her limits, of any of the powers which the original states possessed over such waters within her limits."[30]

§ 173. **Damages for temporary inconvenience.**—Private persons are not entitled to damages for a temporary inconvenience, in common with the public in general, caused by the exercise of a right given by law for the public benefit. The directions of a state providing for the form and character of a bridge will control irrespective of its effect upon navigation, except as against congressional action.[31]

The manner in which the highways of a state, by land or by water, shall be improved for the best interests of the public is a matter for the state to determine, subject to the intervention of Congress when such highways become the means of interstate and foreign commerce. A state may exact reasonable tolls to compensate for the use of artificial facilities for the improvement of navigation.[32]

§ 174. **Building bridges.**—If a bridge is built over a navigable stream in pursuance of a valid authorization from the state, it cannot be adjudged a nuisance. Nor can the provision in the act of admission "that all navigable waters within the state shall be

[29] Cardwell v. American River Bridge Co., 113 U. S. 205, 5 Sup. Ct. Rep. 423, 28 L. ed. 959. The clause affected by the decision was that of the act of September 9, 1850, that "All the navigable waters within the said state shall be common highways and forever free, as to the inhabitants of said state, and as to the citizens of the United States, without any tax, impost or duty therefor." 9 Stats. at Large, 454.

[30] Cardwell v. American River Bridge Co., 113 U. S. 205, 5 Sup. Ct. Rep. 423, 28 L. ed. 959. See, also, Escanaba etc. Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185, 27 L. ed. 442; Pound v. Turck, 95 U. S. 459, 24 L. ed. 525.

[31] Hamilton v. Vicksburg etc. R. R. Co., 119 U. S. 285, 7 Sup. Ct. Rep. 208, 30 L. ed. 395.

[32] Huse v. Glover, 119 U. S. 547, 7 Sup. Ct. Rep. 315, 30 L. ed. 490.

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highways forever," impair the power of the state to grant authority for the construction of bridges over navigable streams.[33]

It is not a violation of the act of Congress admitting Oregon as a state to build a bridge over the Willamette river. Nor can it be assumed that Congress has exercised police power over a navigable river because it has expended money in improving its navigation.[34] The act of Congress of March 3, 1899,[35] authorizing the construction of bridges over navigable waters, and the obstruction of such waters by the construction of bridges, is not in conflict with the Ashburton treaty of 1842, although a substantial diversion of the water might be a violation of the treaty.[36]

§ 175. Head money cases.—A treaty, while primarily a compact between independent nations, may also confer private rights on citizens or subjects of the contracting powers, enforceable by the courts. The treaty during its existence is the supreme law of the land, in all courts where such rights are to be adjudicated, but such treaty may be annulled or suspended by an act of Congress. The supreme court of the United States has frequently decided statutes of a state imposing a tax on immigrants to be void, because the power to enact such statutes was vested exclusively in Congress. But Congress has power to pass such an act, and in 1882 did pass an act to regulate immigration, imposing upon the owners of vessels who should bring passengers from a foreign port into a port of the United States a duty of fifty cents for every passenger who was not a citizen of this country. This was held to be a valid exercise of the power to regulate commerce with foreign nations.[37] It was contended that this act violated provisions contained in numerous treaties with friendly nations. The court said they were not satisfied that the act violated any of such treaties, or any just construction of them,

[33] People v. Potrerio & B. V. R. R. Co., 67 Cal. 166, 7 Pac. 446. See, also, Scheurer v. Columbia etc. Co., 11 Saw. 575, 27 Fed. 174; State v. District Board, 76 Wis. 207, 20 Am. St. Rep. 58, 44 N. W. 977, 7 L. R. A. 340; Keator etc. Co. v. St. Croix, 72 Wis. 84, 7 Am. St. Rep. 850, 38 N. W. 537.

[34] Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. Rep. 811, 31 L. ed. 629.

[35] Stats. at Large, 1151.

[36] Minnesota Canal & Power Co. v. Pratt (Minn.), 112 N. W. 395.

[37] Edye v. Robertson (Head Money Cases), 112 U. S. 580, 5 Sup. Ct. Rep. 247, 28 L. ed. 798. See as to state statutes, "The Passenger Cases," 7 How. (U. S.) 283, 12 L. ed. 702.

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but did not place the defense of the act against this objection upon that suggestion. "We are of the opinion," said the court, "that so far as the provisions in this act may be found to be in conflict with any treaty with a foreign nation, they must prevail in all the judicial courts of this country." The court cited the provision of the Constitution making treaties the supreme law of the land, and said:

"A treaty, then, is a law of the land as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute. But even in this aspect of the case, there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an Act of Congress in this respect, which may be repealed or modified by an Act of a later date. Nor is there anything in its essential character or in the branches of the government by which the treaty is made, which gives it this superior sanctity. A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an Act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the Nations thus at war."[38]

So the act of Congress commonly called the "assisted immigration act" is a constitutional exercise of the power conferred upon Congress to regulate commerce with foreign nations.[39] The act

[38] Edye v. Robertson, 112 U. S. 580, 5 Sup. Ct. Rep. 247, 28 L. ed. 798. See, also, Nishimura Ekin v. United States, 142 U. S. 659, 12 Sup. Ct. Rep. 338, 35 L. ed. 1149; The Chinese Exclusion Case, 130 U. S. 600, 9 Sup. Ct. Rep. 628, 32 L. ed. 1073; Horner v. United States, 143 U. S. 578, 12 Sup. Ct. Rep. 525, 36 L. ed. 269; Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. Rep. 1025, 37 L. ed. 916.

[39] United States v. Craig, 28 Fed. 795.

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prohibiting the importation of alien labor under contract is valid exercise of constitutional power.[40]

§ 176. Reconciling act and treaty.—As a treaty and an act of Congress stand on the same footing, they are both to be considered as statutes, existing on the same subject. When in conflict, the last in date will prevail. But courts will attempt to reconcile them, if possible, so that both may stand and have effect, and the rule applied in the construction of all statutes that repeals by implication are not favored will be enforced. In other words, so far as the courts are concerned, an act of Congress and a treaty, when in conflict, present the ordinary question of conflicting laws, the last modifying or superseding the former, but both to be made effective if it is possible to do so.[41] The courts will not impute to Congress an intention to violate an important provision of a treaty. It must clearly and unequivocally appear that such was the intention, and when it is claimed that Congress so intended, there must be no other reasonable construction of the language which is supposed to constitute the violation.[42]

[40] In re Florio, 43 Fed. 115.

[41] In re Ah Lung, 18 Fed. 28, 9 Saw. 306; In re Chin A On, 18 Fed. 506, 9 Saw. 343; In re Tung Yeong, 19 Fed. 185, 9 Saw. 620; In re Ho King, 14 Fed. 726, 8 Saw. 438; Chinese Merchant's Case, 13 Fed. 605; 7 Saw. 546; Castro v. De Uriate, 16 Fed. 93; Chew Heong v. United States, 112 U. S. 536, 5 Sup. Ct. Rep. 255, 28 L. ed. 770; Whitney v. Robertson, 124 U. S. 195, 8 Sup. Ct. Rep. 457, 31 L. ed. 387; Ropes v. Clinch, 8 Blatchf. 309, Fed. Cas. No. 12,041; Matter of Lobrasciano, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040; Baker v. Newland, 25 Kan. 25.

[42] In re Chin A On, 18 Fed. 506, 9 Saw. 343.

Mr. Duer, in his lectures, says: "A treaty, in its general sense, is a compact entered into with a foreign power, and extends to all matters which are usually the subject of compact between independent nations. It is, in its nature, a contract, and not a legislative act; and does not, according to general usage, effect of itself the objects intended to be accomplished by it, but requires to be carried into execution by some subsequent act of sovereign power by the contracting parties, especially in cases where it is meant to operate within the territories of either of them. With us, however, a different principle is established, in certain cases. It has been settled by the Supreme Court, that, inasmuch as the Constitution declares a treaty to be the law of the land, it is to be regarded in Courts of Justice as equivalent to an act of Legislature, whenever it operates of itself without requiring the aid of any legislative provision. But when the terms of any treaty stipulation import an executory contract, it addresses itself to the politi-

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"By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either, but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is

cal, and not to the judicial, department for execution, and Congress must pass a law in execution of the compact, before it becomes a rule for the Courts. The Constitution does not expressly declare whether treaties are to be held superior to the Acts of Congress, or whether the laws are to be deemed coequal with, or superior to treaties; but the representation it holds forth to foreign powers is that the President, by and with the advice and consent of the Senate, may bind the nation in all legitimate contracts; and if pre-existing laws, contrary to a treaty, could only be abrogated by Congress, this representation would be fallacious. It would subject the public faith to just imputation and reproach, and destroy all confidence in the national engagements. The immediate operation of a treaty must, therefore, be to overrule all existing laws incompatible with its stipulations.

"Nor is this inconsistent with the power of Congress to pass subsequent laws, qualifying, altering or wholly annulling a treaty; for such an authority, in certain cases, is supported on grounds wholly independent of the treaty-making power. For, as Congress possesses the sole right of declaring war, and as the alteration or abrogation of a treaty tends to produce it, the power in question may be regarded as an incident to that of declaring war. The exercise of such a right may be rendered necessary to the public welfare and safety, by measures of the party with whom the treaty was made, contrary to its spirit, or in open violation of its letter; and on such grounds alone can this right be reconciled either with the provisions of the Constitution, or the principles of public law. A memorable instance has occurred in our history of the annulment of a treaty by the act of the injured party. In the year 1798, Congress declared that the treaties with France were no longer obligatory on the United States, as they had been repeatedly violated by the French Government, and our just claims for reparation disregarded. Nevertheless, all treaties, as soon as ratified by competent authority, become of absolute efficacy, and, as long as they continue in force, are binding upon the whole nation. If a treaty requires the payment of money to carry it into effect, and the money can only be raised or appropriated by an Act of the Legislature, it is morally obligatory upon the legislative power to pass the requisite law; and its refusal to do so would amount to a breach of the public faith, and afford just cause of war. That department of the Government which is intrusted with the power of

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self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance."[43]

§ 177. **Absurd conclusion to be avoided.**—In the construction of statutes or of a statute and a treaty, an unjust or absurd conclusion must be avoided. General terms are to be limited and construed so as not to lead to injustice, oppression or absurd consequences.[44] Nor will an act be given a retrospective operation if thereby rights previously vested would be injuriously affected, unless such construction is compelled by language so clear and positive as to permit no doubt to exist that such was the intention of the legislature.[45]

§ 178. **Repeal by implication.**—The rule prevailing in the construction of statutes that repeals by implication are not favored, and that a later statute will not impliedly repeal a former, unless

making treaties may bind the national faith at its discretion; for the treaty-making power must be coextensive with the national exigencies, and necessarily involves in it every branch of the national sovereignty, of which the operation may be necessary to give effect to negotiations and compacts with foreign nations. If a nation has conferred on its Executive department, without reserve, the right of treating and contracting with other sovereignties, it is considered as having invested it with all the power necessary to make a valid contract, because that department is the organ of the Government for the purpose, and its contracts are made by the deputed will of the nation. The fundamental laws of the State may withhold from it the power of alienating the public domain, or other property belonging to it; but if there be no express provision of that kind, the inference is that it has confided to the department, charged with the duty and the power of making treaties, a discretion commensurate with all the great interests of the nation." A Course of Lectures on the Constitutional Jurisprudence of the United States, 2d ed., 228.

[43] Mr. Justice Field, in Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. Rep. 456, 31 L. ed. 386. See, also, Taylor v. Morton, 2 Curt. 454, Fed. Cas. No. 13,799.

[44] Case of the Chinese Merchant, 13 Fed. 605, 7 Saw. 546.

[45] Chew Heong v. United States, 112 U. S. 536, 5 Sup. Ct. Rep. 255, 28 L. ed. 770.

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the repugnancy between them is irreconcilable, applies when it is alleged that a treaty and an act of Congress are in conflict. A later treaty will not be considered as repealing, by implication, an earlier statute, unless the incompatibility between the two is so great that the enforcement of the statute will be impossible without antagonizing the treaty.[46]

The treaty of July 12, 1889, between Great Britain and the United States, provided in the second article: "A fugitive criminal shall not be surrendered, if the offense in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try to punish him for an offense of a political character. No person surrendered by either of the high contracting parties to the other shall be triable or tried, or be punished for any political crime or offense, or for any act connected therewith, committed previously to his extradition. If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final."

The third article declared that: "No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered."

The sixth article provided that: "The extradition of fugitives under the provisions of this convention and of the said tenth article shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State."

The seventh article stipulated that: "The provisions of the said tenth article and of this convention shall apply to persons convicted of crimes therein respectively named and specified, whose sentence therefor shall not have been executed. In a case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the rec-

[46] Johnson v. Browne, 205 U. S. 309, 27 Sup. Ct. Rep. 539, 51 L. ed. 816; United States v. Lee Yen Tai, 185 U. S. 213, 22 Sup. Ct. Rep. 629, 46 L. ed. 878.

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ord of the conviction and of the sentence of the court before which such convention took place, duly authenticated shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers."

The second article, it will be observed, declares that no person surrendered shall be triable or tried *or be punished* for any political crime or offense. But in the third article it is provided that no person surrendered shall be triable or be tried for any offense committed prior to the extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered. It will be noticed that this article uses the words "triable or tried," and omits the words "*or be punished.*" A prisoner sued out a writ of *habeas corpus,* and it appeared that two indictments had been found against him, on one of which he was tried and convicted. He appealed, the conviction was affirmed, and then he made application for a *certiorari* to the supreme court of the United States to review the judgment of conviction, and pending a review of his case, he having been released on bail, fled to Canada. Extradition proceedings were instituted to procure his return upon the judgment of conviction, but it was decided by the British tribunals that the crime set out in the indictment was not provided for by the treaty. His extradition was then sought upon the second indictment, and granted. He was surrendered to an agent of the United States, and taken to New York, where he was arrested upon a warrant based upon the prior indictment and conviction. It was decided that he could not be punished for an offense other than that for which his extradition had been demanded, although he had been convicted and sentenced for such offense prior to his extradition.

§ 179. Fair construction not permitting arrest on prior conviction.—The case involved the construction of the treaty, and it was contended that as the third article did not in so many words expressly prohibit the punishment for another offense for which a person had been convicted, a requisition might be obtained for one crime under that article, and when possession of the person is obtained by this means, he might be punished for another and totally different crime of which he had been convicted prior to his extradition.

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The court said that if the question had arisen under the former treaty of 1842, known as the Ashburton treaty,[47] and the sections of the Revised Statutes relating to extradition,[48] his imprisonment would clearly have been illegal. The court observed that if the words "or be punished" were contained in the third article, the question would not arise, but that it was satisfied that the whole treaty, taken in connection with that of 1842, fairly construed, would not permit his imprisonment upon the former charge.[49]

§ 180. **Reasoning of the court.**—The court, in passing upon the point, said that the mere failure to use the words "*or be punished*" in the third article of the treaty did not so far change and alter "the manifest scope and object" of the two treaties as to render legal the imprisonment on the former conviction. The opinion of the court was delivered by Mr. Justice Peckham, who said: "The general scope of the two treaties makes manifest an intention to prevent a State from obtaining jurisdiction of an individual whose extradition is sought on one ground, and for one express purpose, and then having obtained possession of his person to use it for another and different purpose. Why, the words were left out in the third article of the convention of 1889, when their insertion would have placed the subject entirely at rest, may perhaps be a matter of some possible surprise, yet their absence cannot so far alter the otherwise plain meaning of the two treaties as to give them a totally different construction.

"In addition to the provisions of the treaty of 1889, we find still in existence the already mentioned sections of the Revised Statute, which prohibit a person's arrest or trial for any other offense than that with which he was charged in the extradition proceedings, until he shall have had a reasonable time to return unmolested from the country to which he was brought.

"It is argued, however, that the sections in question have been repealed by implication of the treaty or convention of 1889, and that the respondent, therefore, cannot obtain any benefit from them. We see no fair or reasonable ground upon which to base the claim of repeal. Repeals by implication are never

[47] 8 Stats. at Large, 572, 576.
[48] Rev. Stats., secs. 5272, 5275.
[49] Johnson v. Browne, 205 U. S. 309, 27 Sup. Ct. Rep. 539, 51 L. ed. 816.

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favored, and later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible, and the statute cannot be enforced without antagonizing the treaty.[50] If both can exist, the repeal by implication will not be adjudged. These sections are not incompatible with the treaty or in any way inconsistent therewith. We find nothing in the treaty which provides that a person shall be surrendered for one offense, and then that he may be punished for another, such as is the case here. The most that can be asserted is that an inference to that effect perhaps might be drawn from the absence in article III of positive language preventing such punishment. But that slight and doubtful inference, resting on such an insufficient foundation is inadequate to overcome the positive provisions of the statute and the otherwise general scope of both treaties, which are inconsistent with the existence of such right."

§ 181. Extension of treaty by doubtful construction.—The court declared that it was essential that in the construction of treaties, the highest good faith should be observed, and that in case of extradition, its effect should not be extended by doubtful construction. Mr. Justice Peckham, referring to the contention that the construction contended for was exceedingly technical, and tended "to the escape of criminals on the fine subtleties of statutory construction, and should not, therefore, be adopted," observed: "While the escape of criminals, of course, is to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense, and then punish him for another and different offense. Especially should this be the case where the government surrendering the person has refused to make the surrender for the other offense on the ground that such offense was not one covered by the treaty.

"Our attention has been directed to various other treaties between this government and other nations, where provision is

[50] Citing United States v. Lee Yen Tai, 185 U. S. 213, 22 Sup. Ct. Rep. 629, 46 L. ed. 878.

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expressly made in regard to punishment. They frequently provide that no person shall be triable or tried 'or be punished' for any other offense than that for which he was delivered up, until he has had an opportunity of returning to the country from which he was surrendered. But because in some of the treaties the words 'or be punished' are contained, we are not required to hold that in the case before us the absence of those words permits such punishment, when that construction is, as we have said, contrary to the manifest meaning of the whole treaty, and also violates the statutes above cited.'' [51]

§ 182. **Abrogation must clearly appear.**—While there can be no question that a later statute may abrogate a treaty, ''nevertheless the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty.'' [52] The supreme court of the United States has decided that a treaty with China and an act of Congress prescribing the certificate to be produced by a Chinese laborer as the only evidence permissible to establish his right of re-entry into the United States could both stand.[53] Mr. Justice Harlan, who delivered the opinion of the court, said: "Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the Government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a coordinate department of the Government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.'' [54]

[51] Johnson v. Browne, 205 U. S. 309, 27 Sup. Ct. Rep. 539, 51 L. ed. 816.

[52] United States v. Lee Yen Tai, 185 U. S. 213, 22 Sup. Ct. Rep. 629, 46 L. ed. 878.

[53] Chew Heong v. United States, 112 U. S. 536, 5 Sup. Ct. Rep. 225, 28 L. ed. 770.

[54] Chew Heong v. United States, 112 U. S. 536, 5 Sup. Ct. Rep. 225, 28 L. ed. 770.

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The court said that the utmost that could be asserted was that there appeared to be an apparent conflict between the mere words of the statute and the treaty, and that by implication the treaty was in a measure abrogated. But after referring to the rule that repeals by implication are not favored, and that if by any reasonable construction the two statutes can stand together, they must be enforced, the court proceeded to say: "When the Act of 1882 was passed, Congress was aware of the obligation this Government had recently assumed, by solemn Treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the Treaty and without so declaring in unmistakable terms, to withdraw that privilege by the general words of the 1st and 2nd sections of that Act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer. The presumption must be indulged that the broad language of these sections was intended to apply to those Chinese laborers whose coming to this country might, consistent with the Treaty, be reasonably regulated, limited or suspended, and not to those who, by the express words of the same Treaty, were entitled to go and come of their own free will, and enjoy such privileges and immunities as were accorded to the citizens and subjects of the most favored Nation."[55]

§ 183. Dissenting views of Justices Field and Bradley.—Mr. Justice Field dissented from the opinion of the majority of the court construing the act of Congress, restricting the immigration of Chinese laborers. He said that the construction adopted by the majority of the court appeared to be in conflict with the language of the act, "and to require the elimination of entire clauses and the interpolation of new ones. It renders nugatory whole provisions which were inserted with sedulous care. The change thus produced in the operation of the act is justified on the theory that to give it any other construction would bring it in conflict with the treaty; and that we are not at liberty to

[55] Chew Heong, 112 U. S. 536, 5 Sup. Ct. Rep. 225, 28 L. ed. 770.

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suppose that Congress intended by its legislation to disregard any treaty stipulations."

He adverted to the language of the circuit court that the act of Congress, construed according to the natural meaning of its terms, violates the treaty and the national faith, and that the majority of the court adopting a similar construction of the treaty had narrowed the meaning of the act so as measurably to frustrate its intended operation, and thus proceeded: "If, however, the Act of Congress be in conflict with the Treaty upon the immigration of Chinese laborers, it must control as being the last expression of the sovereign will of the country. And while I agree with all that is said in the opinion of the Court, as to the sanctity of the public faith, I must be permitted to suggest that, if the legislative department sees fit for any reason to refuse, upon a subject within its control, compliance with the stipulations of a Treaty, or to abrogate them entirely, it is not for this court or any other court to call in question the validity or wisdom of its action and impute unworthy motives to it. It should be presumed that good and sufficient reasons controlled and justified its conduct. If the Nation with which the Treaty is made objects to the legislation, it may complain to the executive head of our Government and take such measures as it may deem advisable for its interests. But whether it has just cause of complaint, or whether, in view of its action, adverse legislation on our part be or be not justified, is not a matter for judicial cognizance or consideration. A treaty is, in its nature, a contract between two or more Nations, and is so considered by writers on public law; and by the constitution it is placed on the same footing and made of like obligation as a law of the United States. Both are declared in that instrument to be the supreme law of the land, and no paramount authority is given to either over the other.

"Some treaties operate in whole or in part by their own force, and some require legislation to carry their stipulations into effect. If that legislation imposed duties to be discharged in the future, it may be repealed or modified at the pleasure of Congress. If the Treaty relates to a subject within the powers of Congress, and operates by its own force, it can only be regarded by the courts as equivalent to a legislative Act. Congress may, as with an ordinary statute, modify its provisions or supersede them alto-

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gether. The immigration of foreigners to this country, and the conditions upon which they shall be permitted to come or remain, are proper subjects both of legislation and of treaty stipulation. The power of Congress, however, over the subject can neither be taken away nor impaired by any treaty."[56]

He said that if the construction which he gave worked a hardship to any persons, it was for Congress, and not for the court, to afford the remedy. "This court has no dispensing power over the provisions of an act of Congress. It is itself only the servant of the law; bound to obey it, not to evade or make it."

Mr. Justice Bradley concurred with Mr. Justice Field in dissenting from the judgment, and remarked: "It may be that this view of the law makes it conflict with the treaty, though Justice Field has shown strong reasons to the contrary, but whether it does so or not, I think it is the true construction; and the rule is now settled that Congress may, by law, overrule a treaty stipulation, although, of course, it should not be done without strong reasons for it; and an act of Congress should not be construed as having that effect unless such be its plain meaning."[57] If it is alleged that a conflict exists between a treaty requiring ratification and a legislative act of amendment, the courts, in their construction, will endeavor to give effect to both, but if they cannot be reconciled, will give effect preferably to the legislative enactment.[58]

[56] Chew Heong v. United States, supra.

[57] Chew Heong v. United States, supra.

As said by Chief Justice Marshall: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Cohens v. Virginia (1821), 19 U. S. (6 Wheat.) 264, 399, 5 L. ed. 257, 290. The above language was quoted with approval in United States v. Wong Kim Ark, 169 U. S. 679, 18 Sup. Ct. Rep. 456, 42 L. ed. 901.

[58] Wadsworth v. Boysen, 148 Fed. 771.

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§ 184. Same rule as to repeal of statutes by implication.—As a treaty and an act of Congress are entitled to equal consideration, and neither is in itself paramount to the other, the rule for their construction, when in conflict, or for determining whether one is repealed by the other by implication, is the same as if the treaty and act of Congress were both statutes. It will not be necessary to enter into detail as to the rule of construction recognized when it is claimed that a statute is repealed by implication, but it will be sufficient to quote Mr. Justice Story, who, in speaking of a repeal of a statute by implication, in delivering the opinion of the court, said: "That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."[59]

"It must appear that the later provision is certainly and clearly in hostility to the former. If by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be."[60]

§ 185. Self-executing treaties.—A treaty which requires no further legislation to make it effective becomes, after its ratification, the law of the land, and will be enforced by the courts as a law of Congress.[61] But where the treaty is not complete in

[59] Wood v. United States, 16 Pet. 362, 10 L. ed. 993.

[60] State v. Stoll, 17 Wall. 425, 21 L. ed. 654. See, also, Ex parte Yerger, 8 Wall. 105, 19 L. ed. 339; Ex parte Crow Dog, 109 U. S. 570, 3 Sup. Ct. Rep. 396, 27 L. ed. 1035; Arthur v. Horner, 96 U. S. 140, 24 L. ed. 812; Harford v. United States, 8 Cranch, 109, 3 L. ed. 504.

[61] United States v. Forty-three Gallons of Whisky, 93 U. S. 188, 23 L. ed. 846; Chew Heong v. United States, 112 U. S. 536, 5 Sup. Ct. Rep. 255, 28 L. ed. 770; In re Metzger, 17 Fed. Cas. No. 9511; In re Ah Lung, 18 Fed. 28, 9 Saw. 306.

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itself, but requires further legislation to make it effective, it cannot, of course, be enforced by the courts until such legislation is had.[62] A familiar instance is where an appropriation of money is necessary to carry a treaty into effect. Until such appropriation is made, the treaty is not perfect, as under the Constitution money cannot be appropriated by the treaty-making power.[63] Where, by the treaty with Spain, the island of Porto Rico was ceded to the United States, although it had not been formally embraced by Congress within the customs union of the states, it ceased to remain foreign territory within the meaning of the tariff act providing for the imposition of duties upon articles imported from foreign countries.[64]

§ 186. Chinese exclusion cases.—As showing that an act of Congress in contravention of the terms of a treaty must be upheld when the language of the act is clear and explicit, reference may be made to the legislation providing for the exclusion of Chinese from the United States. It is the inherent and inalienable right of every sovereign and independent nation to exclude or expel aliens or any class of aliens. This right may be exercised in war or in peace, and either absolutely or upon specified conditions. This power under the Constitution of the United States is vested in the political department of the government, and may be exercised either by a treaty or by an act of Congress, and is to be carried into effect by the executive authority according to the regulation established, except so far as intervention by the judicial department is authorized by treaty or by statute, or is required by the Constitution. Congress may exercise its power to expel or exclude aliens entirely through executive officers or may call in the assistance of the judiciary to ascertain any contested facts, on the existence of which the right of an alien to remain is, by the act of Congress, dependent.[65]

[62] Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. Rep. 457, 31 L. ed. 387.

[63] Turner v. American Baptist Missionary Union, 5 McLean (U. S.), 347, Fed. Cas. No. 14,251.

[64] De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. Rep. 743, 45 L. ed. 1041.

[65] Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. Rep. 1016, 37 L. ed. 905; United States v. Ngum Lun May, 153 Fed. 209. See as to other cases, Chae Chan Pang v. United States, 130 U. S. 581, 9 Sup. Ct.

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§ 187. Chinese children born in the United States.—The acts excluding Chinese from the United States do not apply to a person born within the United States of Chinese parents, who reside therein and who are not engaged in any diplomatic or official capacity under the Emperor of China. Such a person is a citizen of the United States.[66] Under the common law a child born within the jurisdiction of the United States is born a subject or citizen thereof, without consideration of the political *status* of its parents.[67] Except for punishment of crime, no citizen can be excluded from the United States.[68] An act of Congress that would attempt to inflict on a citizen of the United States the punishment of banishment or exile, on account of his race or color, or for any cause, would be a bill of attainder within the prohibition of the federal Constitution, and invalid.[69]

§ 188. Application of fourteenth amendment.—By the fourteenth amendment to the Constitution of the United States, the laws providing for the exclusion of Chinese laborers have no application to a person born in the United States and subject to its jurisdiction, notwithstanding that his parents, who were Chinese,

Rep. 623, 32 L. ed. 1068; In re Lau Ow Beu, 141 U. S. 583, 12 Sup. Ct. Rep. 43, 35 L. ed. 868, 144 U. S. 47, 12 Sup. Ct. Rep. 517, 36 L. ed. 340; Chew Heong v. United States, 112 U. S. 536, 5 Sup. Ct. Rep. 255, 28 L. ed. 770; Lem Moon Sing v. United States, 158 U. S. 538, 15 Sup. Ct. Rep. 967, 39 L. ed. 1082; Wong Wing v. United States, 163 U. S. 228, 16 Sup. Ct. Rep. 977, 41 L. ed. 140; United States v. Gue Lim, 176 U. S. 459, 20 Sup. Ct. Rep. 415, 44 L. ed. 544.

It was said in the Japanese immigrant case, Yamataya v. Fisher, 189 U. S. 86, 23 Sup. Ct. Rep. 611, 47 L. ed. 721: "That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court."

[66] In re Yung Sing Hee, 36 Fed. 437, 13 Saw. 482; In re Look Tin Sing, 21 Fed. 905, 10 Saw. 353; In re Wy Shing, 36 Fed. 553, 13 Saw. 530; Ex parte Chin King, 35 Fed. 354, 13 Saw. 333.

[67] McKay v. Campbell, 2 Saw. 118, Fed. Cas. No. 8840; In re Look Tin Sing, 21 Fed. 905, 10 Saw. 353; Lynch v. Clarke, 1 Sand. Ch. 583.

[68] In re Wy Shing, 36 Fed. 553, 13 Saw. 530.

[69] In re Yung Sing Hee, 36 Fed. 437, 13 Saw. 482.

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were not permitted by the naturalization laws to become citizens.[70] The interpretation of the Constitution of the United States should be made in the light of the common law, by which every child born in England of alien parents was a natural-born subject, unless it was the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy occupying in hostility the place of birth of the child. At the time when the fourteenth amendment to the Constitution was adopted there did not exist any settled and definite rule of international law inconsistent with the ancient rule that citizenship arose by birth within the dominion. This amendment did not impose any new restrictions upon citizenship, but affirmed existing law, and declared existing rights, so far as citizenship was concerned, and was intended to allay doubts and to settle controversies which had arisen. It follows, therefore, that the Chinese exclusion acts passed after the adoption of this amendment cannot control its meaning or lessen its effect, but their construction and execution must be in subordination to its provisions. While Congress has power to regulate naturalization, the fourteenth amendment confers upon it no power to restrict the effect of birth, which by the Constitution is declared to be a sufficient right to citizenship.[71]

§ 189. Right to return.—The act of exclusion, unless required by its language, will not be given a retrospective operation.[72] Hence, Chinese laborers who at the date of the treaty with China

[70] Lem Hing Dun v. United States, 49 Fed. 148, 1 C. C. A. 210, 7 U. S. App. 31; Gee Fook Sing v. United States, 49 Fed. 146, 1 C. C. A. 211, 7 U. S. App. 27.

[71] United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. Rep. 456, 42 L. ed. 891. See, where it was held that the evidence was not sufficient to establish the citizenship of a Chinese person sixteen years of age, who claimed that he was born in the United States, and therefore a citizen, Quock Ting v. United States, 140 U. S. 417, 11 Sup. Ct. Rep. 733, 35 L. ed. 501. See, also, the case where it was held that a finding against a person claiming that he was born in San Francisco should not be disturbed on appeal, Gee Fook Sing v. United States, 49 Fed. 146, 1 C. C. A. 211, 7 U. S. App. 27; Lem Hing Dun v. United States, 49 Fed. 148, 1 C. C. A. 210, 7 U. S. App. 31; Lee Foo v. United States, Id. For a proceeding for deportation of a Chinese in which the evidence was held to be insufficient to show that such person was born in the United States, see Ho Ngen Jung v. United States, 153 Fed. 232.

[72] Chew Heong v. United States, 112 U. S. 536, 5 Sup. Ct. Rep. 255, 28 L. ed. 770.

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were in the United States, but who departed before the exclusion act took effect, are entitled to land without producing the certificate required by the act.[73] Chinese subjects, shipping on an American vessel, at an American port, for a round voyage, and who do not land at any foreign port, are not considered as departing from the United States.[74] A person, by neglecting to apply for the certificate required by the statute, renounces the right of return secured to him by the treaty.[75]

§ 190. Power of state to exclude.—In the exercise of its police power, a state may exclude foreigners who are dangerous, such as convicts and lepers, but it cannot discriminate against the citizens as a class of a country possessing treaty rights.[76] The power of exclusion by the state extends to paupers, vagabonds, criminals and sick, diseased, infirm and disabled persons, who will probably become a public charge. The state has power to impose such terms on their admission as will prevent the placing of the burden of their support upon the state. But where persons are in full possession of their faculties, sound in body, and are not paupers, vagabonds nor criminals, and in all respects are competent to earn a livelihood, they cannot be excluded by

[73] In re Tung Yeong, 19 Fed. 184, 9 Saw. 620. A laborer who leaves the United States temporarily may, under the exclusion act, return on obtaining a certificate of identification. Case of the Chinese Waiter, 13 Fed. 286, 7 Saw. 536.

[74] In re Jack Sen, 36 Fed. 441, 13 Saw. 510; In re Tong Wah Sick, 36 Fed. 440, 13 Saw. 497. See, also, United States v. Lee Yung, 63 Fed. 520.

[75] In re Pong Ah Chee, 18 Fed. 527; In re Tong Ah Chee, 23 Fed. 441. The prescribed certificate is necessary. Wan Shing v. United States, 140 U. S. 424, 11 Sup. Ct. Rep. 729, 35 L. ed. 503. But see as to Chinese merchant leaving the country for temporary purposes with intention of returning, Lau Ow Bew v. United States, 144 U. S. 47, 12 Sup. Ct. Rep. 517, 36 L. ed. 340; United States v. Chin Quong Look, 52 Fed. 203; United States v. Gee Lee, 50 Fed. 271, 1 C. C. A. 516, 7 U. S. App. 183; In re Ah Ping, 23 Fed. 329. For other cases involving right to return, see In re Chae Chan Ping, 36 Fed. 431, 13 Saw. 486; United States v. Jung Ah Lung, 124 U. S. 621, 8 Sup. Ct. Rep. 663, 31 L. ed. 591; Lew Jim v. United States, 66 Fed. 953, 14 C. C. A. 281, 29 U. S. App. 513; Lai Moy v. United States, 66 Fed. 955, 14 C. C. A. 283, 29 U. S. App. 517.

[76] In re Ah Fong, 3 Saw. 144, Fed. Cas. No. 102.

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the state, even in the absence of legislation of Congress on the subject.[77]

§ 191. Construction of exclusion laws.—It is not our purpose to consider at any length the force and effect of the various exclusion acts, as our purpose is only to show that their validity is not affected by the fact that they are in conflict with prior treaties, but it may be observed that the proceedings provided by these laws are in no sense a trial or sentence for crime, and, hence, the constitutional provisions requiring due process of law and trial by jury, and prohibiting unreasonable searches and seizures, do not apply.[78] The provision that a Chinese person adjudged to be not lawfully entitled to remain in the United States shall be imprisoned at hard labor is unconstitutional.[79] Placing the burden of proof upon the Chinese person accused of unlawful residence does not conflict with the Constitution.[80] He may be removed by summary proceedings instead of indictment.[81] The prevention of the further immigration of Chinese laborers, and not the expulsion of those in the United States, was the object of the Chinese exclusion act.[82] The term "laborer" is used in its popular sense.[83] A certificate from the Chinese gov-

[77] State v. The Constitution, 42 Cal. 578, 10 Am. Rep. 303.

[78] Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. Rep. 1016, 37 L. ed. 905; United States v. Wong Dep Ken, 57 Fed. 206.

[79] Wong Wing v. United States, 163 U. S. 228, 16 Sup. Ct. Rep. 977, 41 L. ed. 40; United States v. Wong Dep Ken, 57 Fed. 206.

[80] United States v. Wong Dep Ken, 57 Fed. 206; In re Sing Lee, 54 Fed. 334.

[81] United States v. Wong Sing, 51 Fed. 79.

[82] Case of the Chinese Cabin Waiter, 13 Fed. 286, 7 Saw. 536.

[83] In re Ho King, 14 Fed. 724, 8 Saw. 438. For other decisions as to who are laborers, see In re Fook, 65 How. Pr. 404; Lew Jim v. United States, 66 Fed. 953, 14 C. C. A. 281, 29 U. S. App. 513; In re Ah Yow, 59 Fed. 561; United States v. Douglas, 17 Fed. 634; United States v. Sing Lee, 71 Fed. 680; In re Ah Kee, 22 Fed. 519, 22 Blatchf. 520; In re Shong Toon, 21 Fed. 386; United States v. Ah Fawn, 57 Fed. 591; United States v. Wong Ah Hung, 62 Fed. 1005; In re Moncan, 14 Fed. 44, 8 Saw. 350; In re Ah Lung, 9 Saw. 306, 18 Fed. 28. As to merchants, see Lee Kan v. United States, 62 Fed. 914, 10 C. C. A. 669, 15 U. S. App. 516; United States v. Loo Way, 68 Fed. 475; Lai Moy v. United States, 66 Fed. 955, 14 C. C. A. 283, 29 U. S. App. 517; In re Tung Yeong, 19 Fed. 184, 9 Saw. 620; In re Quan Gin, 61 Fed. 395. See, also, Case of the Chinese Wife, 21 Fed. 785; In re Lum Lin Ying, 59 Fed. 682.

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ernment is *prima facie* evidence of the mercantile character of the holder.[84] The certificates of identity are merely licenses.[85] A Chinaman who has lost his certificate by theft may prove his identity.[86] That a merchant is such may be established by parol evidence.[87] Any pertinent and convincing testimony may be received.[88] But the only evidence of the right of a Chinese laborer who departed from the United States after the act of 1882 is the certificate.[89]

§ 192. **Conclusiveness of decision of Department.**—Many of the questions that arose and would arise under the exclusion acts will not, in the future, come before the courts, for the reason that the supreme court of the United States has determined that the decision of the Secretary of Commerce and Labor, affirming the denial of the immigration officers, after examination of the right of a person of Chinese descent to enter the United States, is conclusive on the courts. In *habeas corpus* proceedings, the decision of the secretary is just as conclusive when the ground on which the right of entry is claimed is citizenship as when the ground is any one of those excepted from the exclusion acts. The provision of the statute declaring that the decision of the appropriate department on the right of a person of Chinese descent

[84] In re Tung Yeong, 19 Fed. 184, 9 Saw. 620.

[85] Chae Chan Ping v. United States, 130 U. S. 581, 9 Sup. Ct. Rep. 623, 32 L. ed. 1068.

[86] United States v. Jung Ah Lung, 124 U. S. 621, 8 Sup. Ct. Rep. 663, 31 L. ed. 591.

[87] Case of the Chinese Merchant, 13 Fed. 605.

[88] In re Ho King, 14 Fed. 724, 8 Saw. 438; In re Leong Yick Dew, 19 Fed. 490; In re Ah Quan, 21 Fed. 182.

[89] Case of the Limited Tag, 21 Fed. 789. See, also, In re Tom Mun, 47 Fed. 722; In re Wo Tai Li, 48 Fed. 668. But see as to a merchant, Lau Ow Bew v. United States, 144 U. S. 47, 12 Sup. Ct. Rep. 517, 36 L. ed. 340. A Chinese laborer convicted of felony is not entitled to register. United States v. Chew Cheong, 61 Fed. 200. A Chinaman who came from Canada may be returned to that country. In re Mah Wong Gee, 47 Fed. 433; United States v. Chong Sam, 47 Fed. 478; United States v. Don On, 49 Fed. 569. For various cases relating to Chinese exclusion acts, see United States v. Trumbull, 46 Fed. 755; In re Mah Wong Gee, 47 Fed. 433; United States v. The Geo. E. Wilton, 43 Fed. 606; In re Leo Hew Bow, 47 Fed. 302; United States v. Chung Fung Sun, 63 Fed. 261; United States v. Lee Hoy, 48 Fed. 825; In re Chow Goo Pooi, 25 Fed. 77; In re Ah Yuk, 53 Fed. 781; United States v. Hing Quong Chow, 53 Fed. 233; United States v. Chong Sam, 47 Fed. 878.

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who seeks entry into the United States shall be conclusive on the courts in *habeas corpus* proceedings does not infringe the constitutional guaranty of due process of law, where there is no abuse of authority, notwithstanding that the ground on which the right of entry is based is citizenship of the United States.[90]

§ 193. Hearing arbitrarily denied.—Recently the supreme court of the United States declared that the decision of the Department of Commerce and Labor, in refusing to allow a Chinaman to enter, was final and conclusive, but that this principle was based on the supposition that the decision was reached after a hearing had in good faith, although it might be summary in character. In the petition for a writ of *habeas corpus*, it was alleged that the petitioner was born in the United States of parents domiciled there; that he was denied the right to land; that he was prevented by the officials from obtaining testimony, including that of witnesses named by him, and that if he had been given a proper opportunity, he could have produced overwhelming evidence that he was born in the United States. The allegations substantially were to the effect that he was arbitrarily denied such a hearing and such an opportunity to prove his right of entrance as it was intended by the statute that he should have. The court said that the case could proceed no further, if the petitioner was not denied a fair opportunity to produce the evidence in his behalf that he desired, or if he had a fair though summary hearing. The court held that these facts are the foundation for the jurisdiction of the court, but that such jurisdiction would not be established simply by proving that the officials did not accept the truth of sworn statements, even if no contradicting or impeaching testimony was produced. "The statutes," said Mr. Justice Holmes, delivering the opinion of the court, "purport to exclude aliens only. They create or recognize, for present purposes, it does not matter which, the right of citizens outside the jurisdiction to return to the United States. If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode provided by those statutes, although that mode is intended to be exclusive, the stat-

[90] United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. Rep. 644, 49 L. ed. 1040. In this case Mr. Justice Brewer filed a dissenting opinion, in which Mr. Justice Peckham concurred. Mr. Justice Day also dissented.

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utes cannot be taken to require him to be turned back without more. The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter, and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to the courts." He closed by saying: "But unless and until it is proved to the satisfaction of the judge that a hearing properly so-called was denied, the merits of the case are not open, and we may add, the denial of a hearing cannot be established that the hearing was wrong."[91] It is to be observed that in the case just cited the decision was based upon the allegations contained in the petition, which, if true, showed that a hearing was arbitrarily denied, but the decision in no manner alters the rule that the decision is conclusive when a hearing of some kind in good faith in reality has taken place.

[91] Chin Yow v. United States (decided January 6, 1908), 28 Sup. Ct. Rep. 201.

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CHAPTER IX.

STATE CONSTITUTIONS AND STATUTES IN CONFLICT WITH TREATIES.

§ 194. Comments.
§ 195. Fourteenth amendment applies to aliens.
§ 196. Procedure in criminal cases.
§ 197. Judicial trial necessary.
§ 198. Employment of Chinese by corporation.
§ 199. Comments.
§ 200. Property includes right to labor.
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§ 204. State pilotage laws.
§ 205. Trademarks protected by treaty.
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§ 218. Aliens suing in courts.
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§ 221. Disability of aliens.
§ 222. Title in aliens when treaty made.
§ 223. Taking by devise.
§ 224. Foreign corporation purchasing stock of local corporation.
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§ 226. Alien acquiring title by descent.
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§ 228. Alien has no inheritable blood.
§ 229. Right of alien to take personal property.
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§ 235. Same subject.
§ 236. Same subject—Treaties of 1783 and 1794.
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§ 258. Existence of title at time of treaty.
§ 259. Same rights as resident heir.
§ 260. In North Carolina.
§ 261. Confiscation acts annulled.
§ 262. In Pennsylvania.
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§ 266. In Virginia.

§ 194. **Comments.**—The Constitution places treaties and acts of Congress on the same plane. Both are the supreme law of the land, and one may abrogate or modify the other. The most solemn treaty may be violated by an act of Congress, and although it may be freely conceded that the national faith has been broken, this question is one that concerns the political department of the government, and not the judicial. It is the duty of the courts to declare and enforce the law, and they must enforce acts of Congress even if they conflict with treaties. But in the case of constitutions and statutes of states, no such questions arise. The treaty, whenever it conflicts with a provision of the Constitution or statute of a state or of its common law, will

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supersede it. Both cannot stand when in conflict, and the treaty must be held to be the supreme law. We shall now consider some of the cases in which this conflict has arisen.

§ 195. Fourteenth amendment applies to aliens.—The fourteenth amendment to the Constitution of the United States is not confined to the protection of citizens. The language used in the amendment is comprehensive and universal in its application to all persons within the territorial jurisdiction of the United States, irrespective of any differences that may exist with respect to race, color, or nationality.[1] By the third article of the treaty between the United States and China, it was provided that "if Chinese laborers or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill-treatment at the hands of any other persons, the government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."[2]

Referring to this provision, and speaking of an ordinance making arbitrary and unjust discriminations founded on race between persons otherwise in similar circumstances, Mr. Justice Matthews, in delivering the opinion of the court, said: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political,

[1] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220.

[2] 22 Stats. at Large, 827.

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no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."[3]

§ 196. Procedure in criminal cases.—Aliens who are within the territory of the United States are entitled to the full protection guaranteed by the fifth and sixth amendments relative to procedure in criminal cases. This proposition was very fully discussed in the cases in which the laws providing for the exclusion of Chinese came before the courts. The acts of Congress providing for the exclusion of Chinese laborers from the United States were held to be a constitutional exercise of legislative power, and that so far as they were in conflict with treaties with China, they operated to that extent as an abrogation of the municipal law of the United States.[4] So it was held that the

[3] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220. A statute was passed in Pennsylvania which imposed a tax on employers of foreign-born unnaturalized male persons of a tax of three cents a day for each day that such persons might be employed, and authorized the deduction of that sum from the wages of such persons. This statute was held to be in violation of the fourteenth amendment, in that it deprived such employees of the equal protection of the laws. Fraser v. McConway & Torley Co., 82 Fed. 257. Said the court: "Evidently the act is intended to hinder the employment of foreign-born unnaturalized male persons over 21 years of age. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations obstacles to which others, under like circumstances, are not subjected." An unequal tax upon laundries not run by steam cannot be upheld. In re Yot Sang, 75 Fed. 984.

[4] Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U. S. 581, 9 Sup. Ct. Rep. 623, 32 L. ed. 1069.

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right to exclude aliens, either absolutely or upon conditions, in war or in peace, was an inherent right of every sovereign nation.[5] Admitting that it was competent for Congress to prevent aliens from coming to the United States and to provide for the deportation of those who were unlawfully within its territory, and to submit the enforcement of the laws enacted for that purpose to executive officers, a question arose as to the constitutionality of a section of a subsequent act declaring that "any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States." The contention was made that this section authorized the infliction of an infamous punishment, and, therefore, was in conflict with the fifth and sixth amendments to the Constitution declaring that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, and that in all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury of the state and district in which the crime shall have been committed.

The court said that it thought it clear "that detention or temporary confinement as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest in a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense. So, too, we think it would be plainly competent for Congress to declare the act of an alien in remaining unlawfully within the United States to be an offense punishable by fine or imprisonment, if such offense were to be established by a judicial trial." The court said, however, that the evident intention of the section was that the detention provided for was imprisonment at hard labor to be suffered before the sentence of deportation should be effectuated, and that such imprisonment was to be adjudged upon a summary hearing.[6]

[5] Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. Rep. 1016, 37 L. ed. 905.

[6] Wong Wing v. United States, 163 U. S. 228, 16 Sup. Ct. Rep. 977, 41 L. ed. 140.

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§ 197. **Judicial trial necessary.**—The court adverted to its previous decisions to the effect that the United States, as a matter of public policy, might forbid the coming of aliens or expel those within its territory, and might devolve the power and duty of identifying and arresting such persons and procuring their deportation upon subordinate officials. "But," said Mr. Justice Shiras, delivering the opinion of the court, "when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused. No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."[7]

§ 198. **Employment of Chinese by corporation.**—The Constitution of California adopted in 1879 contains the following clause: "No corporation now existing, or hereafter formed under the laws of this State, shall, after the adoption of this Constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The legislature shall pass such laws as may be necessary to enforce this provision."[8] In pursuance of this constitutional provision an act was passed by the legislature of California declaring that any officer of a corporation who should employ "in any manner, or capacity, upon any work or business of such corporation, any Chinese or Mongolian is guilty

[7] Wong Wo v. United States, 163 U. S. 228, 16 Sup. Ct. Rep. 977, 41 L. ed. 140. That an order of deportation may be made without a jury trial, see In re Tsu Tse Mee, 81 Fed. 565.

[8] Cal. Const. 1879, art. XIX, sec. 2.

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of a misdemeanor," punishable by fine or imprisonment, or both.[9] An officer of a corporation convicted and imprisoned for a violation of this act obtained a writ of *habeas corpus* from the United States circuit court, alleging that this provision of the Constitution and law passed in pursuance of it were void, because they were in violation of the fourteenth amendment to the Constitution of the United States, and the civil rights law, and also of the treaty between the United States and China. Upon the latter point the court held that the treaty-making power had been surrendered by the states to the national government, and that the provisions of the treaty made with China in 1868, recognizing the right of the citizens of China to emigrate to the United States for purposes of curiosity, trade and permanent residence, and providing that Chinese subjects residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to residence and travel as may be enjoyed by the citizens or subjects of the most favored nations, were within the treaty-making power. It was contended that even if the treaty in terms should apply, the provision was not within the treaty-making power, but Judge Sawyer said that he had no doubt that the provision was within this power, and continued: "As to the point whether the provision in question is within the treaty-making powers, I have as little doubt as upon the point already discussed.[10] Among all civilized nations, in modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the Constitution in unlimited

[9] Cal. Pen. Code, secs. 178, 179.

[10] In re Tiburcio Parrott, 6 Saw. 349, 1 Fed. 481. Speaking of the right of the Chinese to the equal protection of the laws, Judge Sawyer said: "It would seem that no argument should be required to show that the Chinese do not enjoy the equal benefit of the laws with citizens, or 'the equal protection of the laws,' where the law forbids their laboring, or making and enforcing contracts to labor, in a very large field of labor which is open, without limit, let or hindrance, to all citizens, and all other foreigners, without regard to nation, race or color. Yet in the face of these plain provisions of the national constitution and statutes, we find, both in the constitution and laws of a great state and member of this Union, just such prohibitory provisions and enactments discriminating against the Chinese. Argument and authority, therefore, seem still to be necessary, and fortunately we are

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terms. Besides, the authorities cited on the first point fully cover and determine this question. If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain. If it has authority to stipulate that aliens residing in a state may acquire and hold property, and on their death transmit it to alien heirs who do not reside in the state, against the provisions of the laws of the state, otherwise valid—and so the authorities already cited hold—then it certainly must be competent for the treaty-making power to stipulate that aliens residing in a state in pursuance of the treaty may labor in order that they may live and acquire property that may be so held, enjoyed, and thus transmitted to alien heirs. The former must include the latter—the principal, the incidental power."

It was accordingly held that these provisions of the Constitution of California and the statute providing a penalty for their violation were void, because they were in conflict with the treaty.[11]

not without either. From the citations already made, and from many more that might be made from Justices Field, Bradley, Swayne and other judges, it appears that to deprive a man of the right to select and follow any lawful occupation—that is, to labor or contract to labor, if he so desires and can find employment—is to deprive him of both liberty and property, within the meaning of the fourteenth amendment and the act of Congress." In re Tiburcio Parrott, 1 Fed. 481, 6 Saw. 349.

[11] In re Tiburcio Parrott, 6 Saw. 349, 1 Fed. 48. In that case Judge Hoffman, United States District Judge, said: "The end proposed to be attained by this extraordinary article is clearly and even ostentatiously avowed. Its title proclaims that it is directed against the Chinese. It forbids their employment by any but private individuals, and when through the operation of the laws they shall have become, or be liable to become, vagrants, paupers, mendicants, or criminals, the legislature is directed to provide for their removal from the state if they fail to comply with such conditions as it may prescribe for their continued residence.

"The framers of the article do not seem to have relied upon the efficacy of the provisions imposing such extensive restrictions upon the rights of the prescribed race to labor for their living, to reduce them to the condition of vagrants, paupers, mendicants, or criminals, or persons who 'may become' such. The legislature is directed to impose conditions of residence, and provide for the removal of '*aliens otherwise dangerous or detrimental to the well-being or peace of the State,*' and lest any doubt or hesitation should be felt as

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§ 199. Comments.—While, confessedly, the police power of a state is very broad, and it is impossible to define it, so as to describe and fix its exact limits, yet it is beyond all doubt that an unconstitutional object cannot be accomplished because it is pretended that the statute, seeking to secure this end, was passed in the legitimate exercise of the police power. It is always com-

to the propriety of including wealthy and respectable Chinese in this class, the fourth section declares 'the presence of foreigners ineligible to become citizens of the United States' (i. e., the Chinese) to be 'dangerous to the well-being of the state.' And the legislature is directed to 'discourage their immigration by all the means within its power.'

"Would it be believed possible, if the fact did not sternly confront us, that such legislation as this could be directed against a race whose right freely to emigrate to this country, and reside here with all 'the privileges, immunities, and exemptions of the most favored nation,' has been recognized and guaranteed by a solemn treaty of the United States, which not only engages the honor of the national government, but is by the very terms of the constitution the supreme law of the land?

"The legislature has not yet attempted to carry into effect the mandate of the first section by imposing conditions upon which aliens who are or may become vagrants, paupers, mendicants, or criminals, may reside in the state, or by providing for their removal. Its action thus far had been limited to forbidding the employment of Chinese, directly or indirectly, by any corporation formed under the laws of this state. The validity of this law is the only question presented for determination in the present case. In considering this question we are at liberty to look not merely to the language of the law, but to its effect and purpose.

"'In whatever language a statute may be framed, its purpose may be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the passenger cases.' Henderson v. Mayor etc., 92 U. S. 268, 23 L. ed. 543.

"'If, as we have endeavored to show, in the opinion in the preceding cases, we are at liberty to look to the effect of a statute for the test of its constitutionality, the argument need go no further.' Chy Lung v. Freeman, 92 U. S. 279, 23 L. ed. 550.

"If the effect and purpose of the law be to accomplish an unconstitutional object, the fact that it is passed in the pretended exercise of the police power, or a power to regulate corporations, will not save it. If a law of the state forbidding the Chinese to labor for a living, or requiring them to obtain a license for doing so, would have been plainly in violation of the constitution and treaty, the state cannot attain the

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petent for the courts to decide what its purpose is, by considering its natural and reasonable effect, no matter in what language the statute may be phrased. It is not possible, by any form in which it may be attempted, to nullify those provisions of the federal Constitution, the object of which is to secure and preserve the liberty of the citizen. If it would be a violation of

same end by addressing its prohibition to corporations.

"In Cummings v. State of Missouri, Mr. Justice Field, speaking for the court, observes: 'Now, as the state, had she attempted the course supposed, would have failed, it must follow that any other mode of procuring the same result must equally fail. The provisions of the federal constitution intended to secure the liberty of the citizen cannot be evaded by the form in which the power of the state is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end can be accomplished by indirect means—the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers of the constitution intended to guard, which may not be effected.' 4 Wall. 320, 18 L. ed. 356.

"The application of these pregnant words to the case at bar is obvious. Few will have the hardihood to deny the purpose and effect of the article of the constitution which has been cited. It is in open and seemingly contemptuous violation of the provisions of the treaty which give to the Chinese the right to reside here with all the privileges, immunities and exemptions of the most favored nation. It is in fact but one, and the latest, of a series of enactments designed to accomplish the same end. The attempt to impose a special license tax upon Chinese for the privilege of mining, the attempt to subject them to peculiar and exceptional punishments commonly known as the Queue Ordinance, have been frustrated by the judgments of this court. The attempt to extort a bond from ship-owners, as a condition of being permitted to land those whom a commissioner of immigration might choose to consider as coming within certain enumerated classes, has received the emphatic and indignant condemnation of the supreme court. Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550. But the question which now concerns us is: Does the law under consideration impair or destroy the treaty rights of Chinese residents? For it may be a part of a system obviously designed to effect that purpose, and yet not of itself be productive of that result. Its practical operation and effect must, therefore, be adverted to.

"The advantages of combining capital, and restricting individual liability, by the formation of corporations, have, from the organization of this state, been recognized by its laws. That method, now universal throughout the civilized world, in the prosecution of great enterprises, has in this state received an unprecedented development. Its laws permit the formation of corporations for any purpose for which individuals may lawfully associate, and the corporations already formed cover almost every field of human activity. The number of certificates on file in the clerk's office of this county alone was stated

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the federal Constitution absolutely to forbid Chinese to labor to obtain a living, the state cannot procure the same result by prohibiting corporations from employing them, as that would be to accomplish indirectly what it cannot do directly.

§ 200. Property includes right to labor.—Property includes everything which has an exchangeable value, and consequently, in a legal sense, labor is property. Next in importance to the

at the hearing to be 8,397. The number in the entire state is of course far greater. They represent a very large proportion of the capital and industry of the state. The employment of Chinese, directly or indirectly, in any capacity by any of these corporations is prohibited by the law. No enumeration would, I think, be attempted of the privileges, immunities, and exemptions of the most favored nation, or even of man in civilized society, which would exclude the right to labor for a living. It is as inviolable as the right of property, for property is the offspring of labor. It is as sacred as the right to life, for life is taken if the means whereby we live be taken. Had the labor of the Irish or Germans been similarly prescribed, the legislation would have encountered a storm of just indignation. The right of persons of those or other nationalities to support themselves by their labor stands on no other or higher ground than that of the Chinese. The latter have even the additional advantage afforded by the express and solemn pledge of the nation.

"That the unrestricted immigration of the Chinese to this country is a great and growing evil, that it presses with much severity on the laboring classes, and that, if allowed to continue in numbers bearing any considerable proportion to that of the teeming population of the Chinese Empire, it will be a menace to our peace and even to our civilization, is an opinion entertained by most thoughtful persons. The demand, therefore, that the treaty shall be rescinded or modified is reasonable and legitimate. But while that treaty exists, the Chinese have the same rights of immigration and residence as are possessed by any other foreigners. Those rights it is the duty of the courts to maintain, and of the government to enforce.

"The declaration that 'the Chinese must go, peaceably or forcibly' is an insolent contempt of national obligations and an audacious defiance of national authority. Before it can be carried into effect by force the authority of the United States must first be not only defied, but resisted and overcome. The attempt to effect this object by violence will be crushed by the power of the government. The attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts; no matter whether it assumes the guise of an exercise of the police power, or of the power to regulate corporations, or of any other power reserved by the state; and no matter whether it takes the form of a constitutional provision, legislative enactment, or municipal ordinance."

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right to life and liberty is the right to make labor available and exchangeable for other things of value. The treaty with China guarantees to the subjects of that country certain privileges and immunities, which they are entitled to enjoy to the same extent as the subjects of the most favored nation. They include all those rights which are fundamental and of right belong to the citizens of all free governments. Among these is the right to labor and the right to follow any lawful employment in a lawful manner.[12]

§ 201. Employment of aliens on public works.—While a state has the general power to say to whom it or its contractors will give employment, still the state, as the state, is a member of the Union, and subordinate in the exercise of its general power to treaties made pursuant to the Constitution; it cannot exercise such power where it will conflict with a treaty. The state of Oregon enacted a law providing that: "It shall be unlawful to employ any Chinese laborers on any street, or part of street, of any city or incorporated town of this state, or on any public works or public improvement of any character, except as a punishment for crime, and all contracts which any person or corporation may have for the improvement of any such street, or part of street, or public works or improvement of any character, shall be null and void from and after the date of the employment of any Chinese laborers thereon by the contractor."[13] A bill in equity was filed to obtain an injunction to enjoin the city of Portland from enforcing the act, and while a demurrer was sustained upon other grounds, the court held that the act of the legislature was void, because in conflict with the treaty which secured to the Chinese residents of the United States the same right to be employed and labor for a living as the subjects of any other nation.[14] Judge Deady referred to the treaty between China and the United States and said: "This treaty, until

[12] In re Tiburcio Parrott, 6 Saw. 349, 1 Fed. 48.

[13] Sess. Laws 1872, p. 9.

[14] Baker v. Portland, 5 Saw. 566, 2 Fed. Cas. No. 777. In the course of the opinion it was said by Judge Deady: "As was said by Mr. Justice Field in the 'Queue Ordinance Case' lately decided in the circuit court for the district of California (Ho Ah Kow v. Nunan, Case No. 6546, 5 Saw. 552), to the national government 'belong exclusively the treaty-making power and the power to regulate

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it is abrogated or modified by the political department of the government, is the supreme law of the land, and the courts are bound to enforce it fully and fairly. An honorable man keeps

commerce with foreign nations, which includes intercourse as well as traffic. . . . . That government alone can determine what aliens shall be permitted to land within the United States and upon what conditions they shall be permitted to land.'

"It will be observed that the treaty recognizes the right of the Chinese to change their home and allegiance and to visit this country and become permanent residents thereof, and as such residents it guarantees to them all the privileges and immunities that may be enjoyed here by the citizens or subjects of any nation. Therefore, if the state can restrain and limit the Chinese in their labor and pursuits within its limits, it may do the same by the subjects of Great Britain, France, or Germany.

"True, this act does not undertake to exclude the Chinese from all kinds and fields of employment. But if the state, notwithstanding the treaty, may prevent the Chinese or the subjects of Great Britain from working upon street improvements and public works, it is not apparent why it may not prevent them from engaging in any kind of employment or working at any kind of labor.

"Nor can it be said with any show of reason or fairness that the treaty does not contemplate that the Chinese shall have the right to labor while in the United States. It impliedly recognizes their right to make this country their home, and expressly permits them to become permanent residents here; and this necessarily implies the right to live and to labor for a living. It is difficult to conceive a grosser case of keeping the word of promise to the ear and breaking it to the hope than to invite Chinese to become permanent residents of this country upon a direct pledge that they shall enjoy all the privileges here of the most favored nation, and then to deliberately prevent them from earning a living, and thus make the proffered right of residence a mere mockery and deceit. In Chapman v. Toy Long (Case No. 2610, 4 Saw. 28), this court in considering these provisions of this treaty, said: 'The right to reside in the country, with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers.'

"Whether it is best that the Chinese or other people should be allowed to come to this country without limit and engage in its industrial pursuits without restraint is a serious question, but one which belongs solely to the national government. Upon it there has always been a difference of opinion, and probably will be for years to come.

"But so far as this court and the case before it is concerned, the treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether." Baker et al. v. Portland, 2 Fed. Cas. No. 777, 5 Saw. 566.

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his word under all circumstances, and an honorable nation abides by its treaty obligations, even to its own disadvantage. The state cannot legislate so as to interfere with the operation of this treaty or limit or deny the privileges or immunities guaranteed by it to the Chinese residents in this country."

The provision of the New York statute making it a crime for a contractor with a municipal corporation for the construction of public works to employ an alien as laborer on such works is void not only because it is an unlawful interference with the personal liberty of the citizen, and a denial of due process of law, but also of treaties providing that foreign citizens residing in the United States shall enjoy the same rights and privileges in respect to their persons and property as are secured to American citizens.[15]

§ 202. **Right to administration.**—A consul of a foreign country is entitled to administer upon the estate of subjects of his country dying intestate, and the clause in a treaty giving him "the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased" will have the effect of superseding a state law giving the right of administration to a local officer. The power conferred upon the consul by the words above quoted is not limited by the succeeding words "conformably with the laws of the country for the benefit of the creditors and legal heirs." These words relate merely to the procedure of administration and not to the right to administer. The fact that a treaty cannot be reconciled with a state law is no reason why a state court should not enforce it.[16]

In the treaty with Italy, the right to administer was not specially mentioned, but the treaty contained a clause to the effect that the respective consuls shall enjoy in both countries "all the rights, prerogatives, immunities and privileges which are now or may hereafter be granted to the officers of the same grade of the most favored nation." But the ninth article of the treaty with

[15] People v. Warren, 13 Misc. Rep. 615, 34 N. Y. Supp. 942. Among the rights of personal liberty is that of making contracts, of laboring for others, and of employing others to labor. Such right is secured by the constitution, and is inalienable. Greenhood's Pub. Pol., rule CCCIII; In re Baker, 29 How. Pr. 485.

[16] Matter of Lobrasciano, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040.

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the Argentine Republic provided that "If any citizen of the two contracting parties shall die without will or testament in any of the territories of the other, the consul-general, or consul of the nation to which the deceased belonged, or the representatives of such consul-general or consul in his absence shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably for the benefit of the creditors and legal heirs." It was held in the surrogate's court of New York that under the most favored nation clause in the treaty with Italy, the privileges granted to consuls of the Argentine Republic were also granted to those of Italy, and hence the consuls of that country had the paramount right to take possession of the estates of Italian subjects dying intestate within his consulor jurisdiction and administer them.[17]

Under the treaty of 1832 between the United States and Russia [18] the two contracting powers have the liberty of having consuls in their respective ports, who are to enjoy the privileges and powers granted to those of the most favored nation. As the most favored nation clause of the treaty of 1853 with the Argentine Republic [19] provides that if any citizen of either of the two contracting parties should die without will or testament in the territory of the other, the consul-general or consul of the nation to which the deceased belonged, or his representative, shall have the right to intervene in the possession, administration and liquidation of the estate of the deceased, it follows that where a Russian subject dies intestate, leaving personal property, the Russian vice-consul is entitled to the appointment of administrator of the estate to the exclusion of the public administrator, who, in the absence of such a provision, would be entitled to administer.[20]

§ 203. Power of court to appoint attorney for absent heirs displaced by treaty.—The power of a court to appoint an attor-

[17] Matter of Fattosini, 33 Misc. Rep. 18, 67 N. Y. Supp. 119. The correctness of this decision was questioned by Surrogate Thomas in Matter of Logiorato, 34 Misc. Rep. 31, 69 N. Y. Supp. 507, but it was approved in Matter of Lobrasciano, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040.

[18] 8 Stats. 848.

[19] 10 Stats. 1001.

[20] In re Wyman, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379. But see Succession of Thompson, 9 La. Ann. 96; Sturgis v. Slacum, 35 Mass. (18 Pick.) 36; Ferrie v. Public Administrator, 3 Bradf. Sur. 249.

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ney for absent heirs authorized by a provision of the code is displaced by a treaty providing that upon the death of a citizen of a foreign country in the United States, without any testamentary executor appointed by him, the consul shall have the right to appear personally or by delegate in all proceedings on behalf of the absent or minor heirs.[21] As to this provision being within the scope of the treaty-making power, Mr. Justice Miller, speaking for the court, said: "It is idle to call in question the competency of the treaty-making power, nor do we think any question can be raised that the subject of this treaty under discussion here is properly within the scope of the power. That subject is the rights of French subjects to be represented here by the consul of their country. On that subject the treaty provision is plain. The treaty by the organic law is the supreme law of the land, binding all courts, state and federal."[22]

§ 204. **State pilotage laws.**—A provision in a treaty that "no higher or other duties or charges shall be imposed in any ports of the United States on British vessels than those payable in the same ports by vessels of the United States" will not supersede state pilotage laws as applied to a British vessel coming from a foreign port, because of the exemption of coastwise vessels of the United States from pilotage under the Revised Statutes of the United States, or on account of any lawful exemption of coastwise vessels created by the laws of the state.[23]

The regulations of a state providing for the appointment of pilots and restricting the right to pilot to those who may receive such appointment do not infringe any inherent rights guaranteed by the federal Constitution, nor do they creat a monopoly or combination forbidden by the federal anti-trust laws.[24]

[21] Succession of Robasse, 47 La. Ann. 1452, 49 Am. St. Rep. 433, 17 South. 867.

[22] Succession of Robasse, 47 La. Ann. 1452, 49 Am. St. Rep. 433, 17 South. 867. Said the court further: "The treaty discloses no purpose to require our courts to appoint as the attorney for the absent heirs the delegate of the French consul. Its purpose is accomplished by placing the delegate before the court, as representing the absent heirs, and precluding any attorney to represent them."

[23] Olsen v. Smith, 195 U. S. 332, 25 Sup. Ct. Rep. 52, 49 L. ed. 224.

[24] Olsen v. Smith, 195 U. S. 332, 25 Sup. Ct. Rep. 52, 49 L. ed. 224.

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§ 205. **Trademarks protected by treaty.**—Treaties frequently provide for the protection of trademarks. But what constitutes a trademark may be a subject of discussion. Under the laws of Germany, words alone, and apart from some symbol or design, are not the subject of appropriation for a trademark. The provision, however, in the treaty with Germany that citizens of that country shall enjoy in the United States the same protection as native citizens in matters of trademarks will not prevent a citizen of Germany from acquiring by prior use in the United States a trademark in a particular word.[25] Nor will the provision in a treaty that if a trademark has become public property in the country of its origin, it shall likewise be free in the territory of the other party, interfere with the appropriation in this country by prior use of a word which cannot be made the subject of appropriation in the other country, party to the treaty.[26]

§ 206. **Persons adding to the prevalence of disease.**—A statute of Louisiana empowered the state board of health in its discretion to "prohibit the introduction into any infected portion of the state of persons acclimated or unacclimated or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease." It was held that this statute was not unconstitutional as infringing upon the right and power of Congress to regulate commerce, nor was it in contravention of the treaties with France and Italy.[27] This case came before the supreme court of the United States. By a divided court the statute was held not to be in conflict either with the Constitution or with any treaty. As to the claim that it conflicted with treaty provisions, Mr. Justice White, who delivered the opinion of the court, said that, assuming that the treaties were applicable, they were not intended to, and did not, deprive the government of the United States of those powers whose exercise was necessary for the health and safety of the people, and that if the treaties were to have the effect claimed,

[25] Baltz Brewing Co. v. Kaiserbrauerei, 74 Fed. 222, 20 C. C. A. 402.

[26] Baltz Brewing Co. v. Kaiserbrauerei, 74 Fed. 222, 20 C. C. A. 402.

[27] Compagnie Francaise etc. v. State Board of Health, 51 La. Ann. 645, 72 Am. St. Rep. 458, 25 South. 591, 56 L. R. A. 795.

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they would be equally operative against a quarantine established by the United States as by a state government. Mr. Justice Brown, with whom was Mr. Justice Harlan, dissented, and stated that while efficient quarantine laws were necessary, there was no authority in the states to enact such laws as would conflict with treaties with foreign nations.[28]

§ 207. **Views of majority of court.**—On the point urged that the statute as applied and construed was void because it was in conflict with the treaties with Italy and France guaranteeing certain rights, privileges and immunities to the citizens of those countries, Mr. Justice White, voicing the opinion of the court, said:

"Reliance is placed, to sustain this proposition, on the provisions of a treaty concluded with the Kingdom of Italy on February 26, 1871; on the terms of a treaty with Great Britain on July 3, 1815, as also a treaty between the United States and the Kingdom of Greece, concluded December 22, 1837, and one concluded with the Kingdom of Sweden and Norway on July 4, 1827. The treaties of other countries than Italy are referred to upon the theory that as by the treaty concluded with France on April 30, 1803, by which Louisiana was acquired, it was provided that France should be treated upon the footing of the most favored nation in the ports of the ceded territory, therefore the treaties in question made with other countries than France were applicable to the plaintiff in error, a French subject.

"Conceding, *arguendo*, this latter proposition, and therefore assuming that all the treaties relied on are applicable, we think it clearly results from their context that they were not intended to, and did not, deprive the government of the United States of those powers necessarily inhering in it and essential to the health and safety of its people. We say the United States, because if the treaties relied on have the effect claimed for them, that effect would be equally as operative and conclusive against a quarantine establishment by the government of the United States as it would be against a state quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress. Without

[28] Compagnie Francaise v. State Board of Health, 186 U. S. 380, 22 Sup. Ct. Rep. 811, 46 L. ed. 1209.

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reviewing the text of all the treaties, we advert to the provisions of the one made with Greece, which is principally relied upon.

. . . .

"It is apparent that it provides only the particular form of document which shall be taken by a ship of the Kingdom of Greece and reciprocally by those of the United States for the purpose of establishing that infectious or contagious diseases did not exist at the point of departure. But it is plain from the face of the treaty that the provision as to the certificate was not intended to abrogate the quarantine power, since the concluding section of the article in question expressly subjects the vessel holding the certificate to quarantine detention, if, on its arrival, a general quarantine had been established against all ships coming from the port whence the vessel holding the certificate had sailed. In other words, the treaty having provided the certificate and given it effect under ordinary conditions, proceeds to subject the vessel holding the certificate to quarantine, if, on its arrival, such restriction had been established in consequence of infection deemed to exist at the port of departure. Nothing in the text of the treaty, we think, gives even color to the suggestion that it was intended to deal with the exercise by the government of the United States of its power to legislate for the safety and health of its people or to render the exertion of such power nugatory by exempting the vessels of the Kingdom of Greece, when coming to the United States, from the operation of such laws. In other words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them. Especially where the restriction imposed upon the vessel is based, not upon the conditions existing at the port of departure, but upon the presence of an infectious or contagious malady at the port of arrival within the United States, which, in the nature of things, could not be covered by the certificate relating to the state of the public health at the port whence the ship had sailed."[29]

[29] Compagnie Francaise v. State Board of Health, Louisiana, 186 U. S. 380, 22 Sup. Ct. Rep. 811, 46 L. ed. 1216. The language of article 15 of the treaty with Greece referred to in the above opinion is as follows: "Article 15. It is agreed that vessels arriving directly from the United States of America at a port within the dominions of His Majesty the King of Greece, or from the Kingdom of Greece, at a port of

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§ 208. Dissenting views.—Mr. Justice Brown, in his dissenting opinion, said on the point of the construction of the treaty stipulation:

"I am also unable to concur in the construction given in the opinion of the court to the treaty stipulation with France and other foreign powers. The treaty with France of 1803 provides that 'the ships of France shall be treated upon the footing of the most favored nations in the ports above mentioned' of Louisiana. Article 15 of the treaty with Greece of December 22, 1837, set forth in the opinion, provides that vessels arriving directly from the Kingdom of Greece at any port of the United States of America, 'and provided with a bill of health granted by an officer having competent power to that effect at the port whence such vessel shall have sailed, setting forth that no malignant or contagious diseases prevailed in that port, shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessels shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes: *Provided always,* That there shall be on board no person, who, during the voyage, shall have been attacked with any malignant or contagious diseases; that such vessels shall not, during their passage, have communicated with any vessel liable itself to undergo a quarantine; and that the country whence they came shall not at that time be so far infected or suspected that, before their arrival, an ordinance had been issued in consequence of which all vessels coming from that

the United States of America, and provided with a bill of health granted by an officer having competent power to that effect at the port whence such vessel shall have sailed, setting forth that no malignant or contagious diseases prevailed in that port, shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessel shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes; Provided, always, that there shall be on board no person who, during the voyage, shall have been attacked with any malignant or contagious disease; that such vessels shall not, during the passage, have communicated with any vessel liable itself to undergo a quarantine; and that the country whence they came shall not at that time be so far infected or suspected that, before their arrival, an ordinance had been issued in consequence of which all vessels coming from that country should be considered as suspected, and consequently subject to quarantine." 8 Stats. at Large, 506.

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country should be considered as suspected, and consequently subject to quarantine.'

"If the law in question in Louisiana, excluding French ships from all access to the port of New Orleans, be not a violation of the provision of the treaty that vessels 'shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessels shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes,' I am unable to conceive a state of facts which would constitute a violation of that provision. Necessary as efficient quarantine laws are, I know of no authority in the states to enact such as are in conflict with our treaties with foreign nations."[80]

§ 209. **South Carolina Dispensary Act.**—In 1892 a statute was passed in South Carolina prohibiting the manufacture or sale of intoxicating liquors as a beverage in that state, but providing for the appointment of a commissioner who was authorized to purchase all intoxicating liquors for lawful sale in the state, and to furnish the same to certain persons designated as dispensers, who in turn should sell them on the conditions prescribed by the act. It was declared in the statute that "the manufacture, sale, barter, or exchange, or the keeping or offering for sale, barter, trade or exchange, within this state of any spirituous, malt, vinous, fermented or other intoxicating liquors, or any compound or mixtures thereof, by whatever name called, which will produce intoxication, by any person, business, firm, corporation or association, shall be regulated and conducted as provided in this act." A bill in equity was filed by certain Italian subjects against the governor and treasurer of the state, to enjoin them from carrying out the provisions of this law, and among other grounds urged, it was contended that the act was in conflict with the treaty with Italy. The court stated that the complainants had under the treaty the same rights as citizens of the United States, and that it would be absurd to say that they had greater rights. The court declared that the right to sell intoxicating liquors is within the police power of the states, and that "The police power is a right reserved by the states, and

[80] Compagnie Francaise v. State Board of Health of Louisiana, 186 U. S. 380, 22 Sup. Ct. Rep. 811, 46 L. ed. 1209.

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has not been delegated to the general government. In its lawful exercise, the states are absolutely sovereign. Such exercise cannot be affected by any treaty stipulations."[31]

§ 210. Treaty devesting state of right to tax.—A treaty may exempt a foreign citizen from the payment of a succession tax, either by direct language or by implication under the favored nation clause. The statute of Louisiana provided that "every person not domiciled in this state, and not being a citizen of any state or territory of the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this state or elsewhere, shall pay a tax for the benefit of the Charity Hospital of ten per cent on all sums due, on the value of all property which may have actually been received from said succession, or so much thereof as is situated in this state, after deducting all debts due by the said succession." Resistance to a demand for the payment of this tax was based on the provisions of the Italian treaty of 1871 that: "The citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by sale, donation, testament, or otherwise; and their representatives, being citizens of the other party, shall succeed to their personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves, or others acting for them, and dispose of the same at their will, paying such duties only as the inhabitants of the country wherein such goods are

[31] Cantini v. Tillman, 54 Fed. 969, per Simonton, District Judge. The language of the treaty relied on in that case was:

"Art. 2. The citizens of each of the high contracting parties shall have liberty to travel in the states and territories of the other; to carry on trade, wholesale and retail; to hire and occupy houses and warehouses; to employ agents of their choice; and generally to do anything incident to or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.

"Art. 3. The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

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shall be subject to pay in like cases. As for the case of real estate, the citizens and subjects of the two contracting parties shall be treated on the footing of the most favored nation." For the purpose of determining what rights were conferred by the clause that the citizens of the foreign country should, in the case of real estate, "be treated on the footing of the most favored nation," the court proceeded to examine treaties made with other nations, and as in some other treaties provisions existed declaring that foreign citizens might enjoy real property in the same manner as citizens of the United States, and should not be subjected to taxes on transfer or inheritance different from those paid by American citizens, or to taxes which should not be equally imposed, the court held that subjects of Italy were exempt from the payment of this tax levied against foreign heirs.[32] Likewise, it was held that foreign citizens were exempt from the payment of this tax under the treaty with France [33] and Bavaria.[34] But where the tax has become vested in the state before the conclusion of a treaty, a treaty subsequently made cannot devest the right to the tax.[35] This is true, not only where the words of the treaty are doubtful, but also even if the words of the treaty had imported such an intention.[36]

It was held in Louisiana that the words "personal goods" in the treaty of 1795 between the United States and Spain refer to movable property only, and that the only action taken by the two governments respecting real estate was to provide for the consequences of the special case where foreign citizens should be prohibited from inheriting real estate. Hence a succession or inheritance tax may be charged on foreign heirs and legatees.[37]

§ 211. Criminal procedure.—While a foreign citizen is entitled to the equal protection of the laws, he cannot claim more.

[32] Succession of Rixner, 48 La. Ann. 563, 19 South. 601, 32 L. R. A. 189. In Succession of Robasse, 49 La. Ann. 1413, 22 South. 767, the authorities are reviewed, and Succession of Rixner, 48 La. Ann. 558, 19 South. 597, 32 L. R. A. 177, affirmed.

[33] Dufour's Succession, 19 La. Ann. 391; Prevost's Succession, 12 La. Ann. 577; Marquis de Circe's Succession, Manning's Unreported Cases, 412. See Amat's Succession, 18 La. Ann. 403.

[34] Crusui's Succession, 19 La. Ann. 369.

[35] Prevost v. Greenaux, 19 How. (U. S.) 1, 15 L. ed. 572.

[36] Prevost v. Greenaux, 19 How. (U. S.) 1, 15 L. ed. 572.

[37] Succession of Sala, 50 La. Ann. 1009, 24 South. 674.

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In the "Anarchist Cases" of Chicago it was claimed in the supreme court of the United States that certain federal questions were involved, and among other suggestions made in behalf of two of the petitioners—one of whom was born in Germany and the other in Great Britain—was that they had been denied by the state court rights guaranteed to them by treaties between the United States and their respective countries. The court said that as to this contention it was sufficient to say that no such questions were made or decided in the courts below, and they could not be raised in the supreme court of the United States for the first time. While of course it is a *dictum*, not necessary to the decision, yet it should be observed that Mr. Chief Justice Waite, in delivering the opinion of the court, added: "Besides, we have not been referred to any treaty, neither are we aware of any, under which such a question could be raised." [38]

§ 212. Consuls acting as judges.—Courts of a state may be deprived by a treaty of jurisdiction exercised by them over a certain class of actions or proceedings. The treaty between the United States and Norway provides that "the consuls, vice-consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right as such to sit as judges and arbitrators on such differences as may arise between the captains and crews of the vessels belonging to the nation, whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or tranquility of the

[38] Ex parte Spies, 123 U. S. 131, 8 Sup. Ct. Rep. 21, 31 L. ed. 80. That to authorize a writ of error to a state court, the question involved must have been decided in the court below, see Chappell v. Bradshaw, 128 U. S. 134, 9 Sup. Ct. Rep. 40, 32 L. ed. 370; Brooks v. Missouri, 124 U. S. 394, 8 Sup. Ct. Rep. 443, 31 L. ed. 456; Leeper v. Texas, 139 U. S. 467, 11 Sup. Ct. Rep. 579, 35 L. ed. 227; French v. Hopkins, 124 U. S. 524, 8 Sup. Ct. Rep. 589, 31 L. ed. 537; Baldwin v. Kansas, 129 U. S. 57, 9 Sup. Ct. Rep. 195, 32 L. ed. 642; Manning v. French, 133 U. S. 191, 10 Sup. Ct. Rep. 260, 33 L. ed. 585; Northern Pac. Ry. Co. v. Austin, 135 U. S. 318, 10 Sup. Ct. Rep. 759, 34 L. ed. 219; Brown v. Massachusetts, 144 U. S. 579, 12 Sup. Ct. Rep. 759, 36 L. ed. 550; McNulty v. California, 149 U. S. 648, 13 Sup. Ct. Rep. 960, 37 L. ed. 884; Schuyler Nat. Bank v. Bollong, 150 U. S. 88, 14 Sup. Ct. Rep. 25, 37 L. ed. 1009; Morrison v. Watson, 154 U. S. 115, 14 Sup. Ct. Rep. 997, 38 L. ed. 929.

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country, or the said consuls, vice-consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood, that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."[39] It is almost uniformly decided that such a treaty takes away all right of action for wages in the courts of the United States by a seaman coming within the purview of the treaty, regardless of the question whether the action is *in rem* or *in personam*.[40]

A libel for wages brought by an American seaman against a German vessel, where he had shipped on board and claimed to be entitled to a discharge, was dismissed, although the judge stated that if the fact had been proved that a discharge had been granted, he would have been inclined to assume jurisdiction.[41]

A citizen of the United States brought a libel against a Norwegian steamship for damages and for wages. He alleged that he shipped on the vessel at Mobile for a round voyage to Tampico, and that when he arrived in Mobile Bay, on the return trip,

[39] 8 U. S. Stats. 346, 352.

[40] Tellefsen v. Fee, 168 Mass. 188, 60 Am. St. Rep. 379, 46 N. E. 562, 45 L. R. A. 481; The Elwine Kreplin, 9 Blatchf. 438, Fed. Cas. No. 4426; Norberg v. Hillgren, 5 N. Y. Leg. Obs. 177; The Salomoni, 29 Fed. 534; The Burchard, 42 Fed. 608; The Marie, 49 Fed. 286; The Welhaven, 55 Fed. 80.

In Tellefsen v. Fee, supra, the court said: "An examination of the treaty and authorities above cited makes it plain that the court has no discretion in the matter, and that the local authorities have no right to interfere. Where jurisdiction is given by a treaty to a consul, vice-consul, or a commercial agent, he alone has authority to act in determining in the first instance whether wages are due and the amount. It is to be remembered that the United States government has the same right by the treaty in regard to its vessels in Norway; and this right is insisted upon by our government. In the United States Consular Regulations of 1888, page 25, paragraph 66, under the title 'Jurisdiction over Disputes Between Masters, Officers and Crews,' appears the following: 'Exclusive jurisdiction over such disputes in the vessels of the United States, including question of wages, is conferred by treaties or conventions with' several governments named, and among them Sweden and Norway. And on page 92, paragraph 273, is also the following: 'In many instances, by treaty and consular convention, the United States have secured to their consular officers jurisdiction over question of wages, shipment and discharge of seamen.'"

[41] The Burchard, 42 Fed. 608.

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he was put ashore, manacled and finally discharged without full pay. The Norwegian consul intervened, asserting jurisdiction, and his position was sustained and the libel dismissed.[42] The United States district court in Maine, however, entertained jurisdiction of a libel against a Swedish vessel on the ground that Sweden has no consular representative in that district.[43]

§ 213. Municipal ordinances.—The supreme court of the United States has had before it several cases in which it was called upon to consider the extent of the police power of the states in the prescription of regulations for the promotion of the health, peace, morals, education and good order of the people. It is recognized that the state possesses supreme power over police regulations.[44] Thus, a municipal ordinance which prohibits the carrying on of public laundries and washhouses within certain defined limits of a city, between certain hours during the night, is a police regulation. Such an ordinance is within the power of the city to make, and it cannot be supervised by a federal tribunal.[45] Such an ordinance is not void on the ground that it creates a discrimination between those engaged in the laundry

[42] The Welhaven, 55 Fed. 80. In The Elwine Kreplin, 9 Blatchf. 438, Fed. Cas. No. 4426, the question is considered fully.

[43] The Amalia, 3 Fed. 652.

[44] Commonwealth v. Alger, 7 Cush. (Mass.) 84; Taunton v. Taylor, 116 Mass. 254; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Slaughter-house Cases, 83 U. S. (16 Wall.) 36, 21 L. ed. 394; Lake View v. Rose Hill Cemetery, 70 Ill. 191, 22 Am. Rep. 71; Daniels v. Hilgard, 77 Ill. 640; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989.

It is competent for the state to forbid the carrying of concealed weapons (State v. Wilforth, 74 Mo. 528, 41 Am. Rep. 330); or to require professional graduates to possess certain qualifications. State v. Hayward, 3 Rich. 389; Regents v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72.

A state has the right, under its police power, to prohibit by a subsequent statute the transportation of dead animals under a charter which permits their use as fertilizers, as the police power of a state is adequate to give an effectual remedy against nuisances. Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; S. C., 70 Ill. 634. Under this power regulations may be imposed for the protection of markets against the sale of commodities unfit for commerce. New Haven etc. T. B. Co. v. Bunnell, 4 Conn. 59; State v. Fosdick, 21 La. Ann. 256.

[45] Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923. Mr. Justice Field, in delivering the opinion of the court, said that neither the fourteenth amendment nor any other amendment "was designed to interfere with the power

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business and those in other classes, nor on the ground that it deprives a person of his right to labor at all times or that it is unreasonable.[46]

If, however, a law be impartial in its appearance, yet if it is administered unequally and with partiality, so as to cause illegal discriminations between persons similarly situated, such administration will constitute a denial of equal justice within the prohibition of the Constitution.[47]

§ 214. Special rights to American citizens.—A treaty which provides that the citizens of a foreign country shall have free access to the tribunals in their affairs of litigation on the same terms which are granted by the law and usages of the country to native citizens and subjects refers only to ordinary litigation. It does not prevent the government from subsequently bestowing special rights of action on its own citizens against itself

of the state, sometimes termed its 'police power' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint, if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment.''

[46] Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. Rep. 730, 28 L. ed. 1145.

[47] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 221. Mr. Justice Matthews, in delivering the opinion of the court, said: ''When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.''

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to the exclusion of aliens. Hence such foreign subjects are not entitled to maintain an action in the court of claims for Indian depredations under an act of Congress giving this court jurisdiction of claims for property of citizens of the United States taken or destroyed by an Indian tribe or nation.[48]

§ 215. Right of nonresident aliens to damages for death of relative.—Statutes have been passed in many of the states giving a right of action to the husband or wife or next of kin of a person who has been killed by the negligence of another. There is a diversity of opinion upon the question whether a nonresident alien may claim the benefits of such statutes. On the one hand it is asserted that a construction of the statute which would include nonresident aliens is contrary to its spirit and policy.[49] In Colorado a similar construction was placed upon the statute of that state.[50] So in Wisconsin, it was held that such statutes had no extraterritorial force, bound only those within the limits of the state, and hence nonresident aliens could not claim the benefit of the statute.[51] On the other hand, it is declared that while no duties can be imposed by statute upon persons within the limits of another state, still, rights can be offered to such persons, and there is nothing to prevent them from accepting the offer.[52] This is on the theory that statutes of this character are enacted for the benefit of the employee, and this is the reason that a cause of action is given to the next of kin. The statute is equivalent to

[48] Valk v. United States, 29 Ct. of Cl. 62.

[49] Deni v. Pennsylvania R. R. Co., 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558. "Our statute," said the court, "was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include nonresident aliens, husbands, widows, children, and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it."

[50] Brannigan v. Union G. M. Co., 93 Fed. 164.

[51] McMillan v. Spider Lake Sawmill etc. Co., 115 Wis. 332, 95 Am. St. Rep. 947, 91 N. W. 979, 60 L. R. A. 589.

[52] Mulhall v. Fallon, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386, 54 L. R. A. 934. "In all cases," said Mr. Chief Justice Holmes, "the statute has the interests of the employees in mind. It is on their ac-

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a penalty placed upon the employer for his negligence, and its primary object is to secure the protection of the life of the employee. It may be said that the weight of authority is in favor of the proposition that the statute is intended to protect the laboring man by enforcing the observance by the employer of the rule requiring him to furnish his servant with a safe place in which to work, and there can be no valid reason for limiting the right to recover damages to resident aliens.[53]

§ 216. Prevention of intrusion on Indian lands a police regulation.—As an instance of a police regulation not inconsistent with a treaty, attention may be called to a statute of New York which authorized the summary removal of persons other than Indians, settling or residing upon lands belonging to or occupied by any nation or tribe of Indians. This statute, it was contended among other grounds, was invalid, because in conflict with a treaty made with an Indian tribe. The court upheld it, however, as a police regulation for the protection of Indians from intrusion and for the preservation of the peace, and remarked: "The power of a state to make such regulation to preserve the peace of the community is absolute, and has never been surrendered."[54] The state can exercise its police power over an Indian reservation.[55] An Indian may be indicted under the criminal laws of a state for a murder committed out of the reservation.[56]

count that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator the sum to be recovered is to be assessed with reference to the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in."

[53] Alfson v. Bush Company, 182 N. Y. 393, 108 Am. St. Rep. 815, 75 N. E. 230; Kellyville Coal Co. v. Petrayis, 195 Ill. 215, 88 Am. St. Rep. 191, 63 N. E. 94; Renlund v. Commodore Min. Co., 89 Minn. 47, 99 Am. St. Rep. 534, 93 N. W. 1057; Romano v. Capital City Brick Co., 125 Iowa, 591, 106 Am. St. Rep. 323, 101 N. W. 437; Pittsburgh etc. Ry. Co. v. Naylor, 73 Ohio St. 115, 112 Am. St. Rep. 701, 76 N. E. 505, 3 L. R. A., N. S., 473.

[54] State of New York v. Dibble, 21 How. (U. S.) 366, 16 L. ed. 149.

[55] Benson v. United States, 44 Fed. 182.

[56] United States v. Sa-coo-da-cot, 1 Abb. (U. S.) 383, Fed. Cas. No.

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§ 217. Covenant not to rent property to a Chinaman.—A covenant not to rent property to a Chinaman is an infraction of the treaty with China, guaranteeing to its subjects in the United States all the rights, privileges and immunities accorded to citizens and subjects of the most favored nation. A suit was brought to enjoin the execution of a lease in alleged violation of a covenant in a deed of this character. Many decisions have been made by the federal courts, nullifying hostile and discriminating legislation aimed at Chinese residents, but it was contended that the question as to the legality of the covenant in the deed did not present a case of legislation at all, and hence was not affected by these decisions. The court held that the covenant was in conflict with the fourteenth amendment providing, among other things, that no state shall "deny to any person the equal protection of the laws," and declared that it would be a very narrow construction of this constitutional amendment and the decisions based upon it to hold that while state and municipal legislatures cannot discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract enforceable by the courts. "Such a view," said Judge Ross, "is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear." [57]

With relation to the clause in the treaty, the court referred to the case where it was sought to enforce a contract made in the United States, after Texas had declared its independence, but before the acknowledgment of independence by this country, in which the complainants agreed to furnish, and pursuant to which they did furnish, money to a general in the Texan army, to enable him to raise and equip troops to be used against Mexico. Chief Justice Taney in that case said that a citizen was "bound to be at war with the country against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the Government is in

16,212, 1 Dill. 276. See, also, as to application of the criminal laws of a state to an Indian reservation, State v. Doxtater, 47 Wis. 287, 2 N. W. 443.

[57] Gandolfo v. Hartman, 49 Fed. 181, 16 L. R. A. 277.

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amity and friendship. . . . . And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the Department of the Government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our Government is pledged by a treaty to be at peace, without the breach of his duty as a citizen, and a breach of the faith pledged to the foreign nation. And if he does so, he cannot claim the aid of a court of justice to enforce it."[58] This is a brief extract from the opinion of Judge Taney, from which Judge Ross quoted at greater length, and he stated his conclusion to be that "the principle governing the case is, in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the Government, in contravention of one of its treaties, and in violation of a principle embodied in its Constitution. Such a contract is absolutely void, and should not be enforced in any court—certainly not in a court of equity of the United States."[59]

§ 218. Aliens suing in court.—Resident aliens, in all that relates to the protection of their personal and property rights, have practically the same rights and privileges as citizens, and as a consequence they possess the legal remedies necessary for the enforcement of such rights. Alien friends, irrespective of the question of their residence or nonresidence, have, in the absence of disabling statutes, the right to hold and dispose of property and make contracts, and have the right to resort to the courts for the protection of those rights. But a suit between two nonresident aliens upon a cause of action arising in a foreign state can be maintained only on principles of comity and not as a matter of right. Actions or proceedings of an auxiliary or equitable character in the nature of attachment and execution are governed by the same rule, although residents of the state may

[58] Kennett v. Chambers, 55 U. S. (14 How.) 49, 14 L. ed. 321.

[59] Gandolfo v. Hartman, 49 Fed. 181, 16 L. R. A. 277.

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be parties to the auxiliary actions as stakeholders or claimants of the property sought to be reached.[60]

A state has jurisdiction over persons found within its limits, and judgment may be rendered against such persons in all cases in which personal service is had within the state.[61]

§ 219. **Transitory Actions.**—The fact that persons are found within the limits of a court does not obligate it to assume jurisdiction of a transitory cause of action arising in a foreign country, but it may exercise such jurisdiction on the principles of comity.[62] If plaintiff does not intend to return to the country from which he came, the courts will entertain jurisdiction.[63]

Courts, however, have refused to proceed where a transitory cause of action was based upon the statute of another country, owing to the difficulties that would arise in its construction and the inconvenience and danger of injustice attending such an investigation.[64]

[60] Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 115 Am. St. Rep. 1063, 106 N. W. 821. The court held that the provisions of the treaty between the United States and Prussia, concluded in 1828, and also of the treaty of 1799 between the same countries, had no bearing on the questions involved.

[61] Roberts v. Dunsmuir, 75 Cal. 203, 16 Pac. 782; Taylor v. Sharp, 108 N. C. 377, 13 S. E. 138; Smith v. Gibson, 83 Ala. 284, 3 South. 321; Stone v. United States, 167 U. S. 178, 17 Sup. Ct. Rep. 778, 42 L. ed. 127; Insurance Co. of North America v. McLimas, 28 Neb. 653, 44 N. W. 991; Gibson v. Everett, 41 S. C. 22, 19 S. E. 286; Ex parte Perry etc. Co., 43 S. C. 176, 20 S. E. 980.

[62] Dewitt v. Buchanan, 54 Barb. 33; Gardner v. Thomas, 14 Johns. 134, 7 Am. Dec. 445; Mason v. Blaireau, 2 Cranch, 240, 2 L. ed. 266.

[63] Johnson v. Dalton, 1 Cow. 543, 13 Am. Dec. 564; Pugh v. Gillam, 1 Cal. 485.

[64] Great Western Ry. Co. v. Miller, 19 Mich. 305; Mexican etc. Ry. Co. v. Jackson, 89 Tex. 107, 59 Am. St. Rep. 28, 33 S. W. 857, 31 L. R. A. 276. "There could be no reasonable certainty that the parties' rights would be adjusted here as they would be if the case were tried in the courts of that country, which is their right, for it is well settled that if one state undertakes to enforce a law of another state, the interpretation of that law as fixed by the courts of the other state is to be followed. This difficulty of itself furnishes a sufficient reason for the courts of this state to decline to assume jurisdiction of this class of cases." Mexican etc. Ry. Co. v. Jackson, 89 Tex. 107, 59 Am. St. Rep. 28, 33 S. W. 857, 31 L. R. A. 276. As to suits upon a transitory cause of action arising in another state of the Union, see Cofrode v. Gartner, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511. Where the cause of action does not rest upon the common law,

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§ 220. Rights of alien to inherit affected by treaty—Comments.—Perhaps the most common case in which the laws of a state have been altered, or, rather, suspended, by treaties is that involving the rights of aliens to inherit land. Treaties have been concluded with various nations in which the right to inherit lands has been given to their subjects, and it has been uniformly held both by the federal and state courts that where such treaties have been made, the disability of the subjects of the treaty-making nation have, for the time being, been suspended. Before passing to a consideration of these cases, it may be well to pause for a moment and consider the rights of aliens at common law.

§ 221. Disability of aliens.—An alien at common law may acquire title by purchase, and his title is good against everybody but the state. His title can only be devested by office found or by some act performed by the state for the purpose of acquiring possession.[65] A person who is a *bona fide* resident of a state, although he is not a citizen of the United States nor has declared his intention to become one, may acquire by conveyance and hold the title of the locators of an unpatented mining claim obtained

but upon a state statute, see St. Louis etc. Ry. Co. v. McCormick, 71 Tex. 660, 9 S. W. 540, 1 L. R. A. 804; Texas etc. Ry. Co. v. Richards, 68 Tex. 375, 4 S. W. 627; Morris v. Missouri Pac. Ry. Co., 78 Tex. 17, 22 Am. St. Rep. 17, 14 S. W. 228, 9 L. R. A. 349.

[65] Craig v. Leslie, 16 U. S. (3 Wheat.) 563, 4 L. ed. 460; Taylor v. Benham, 46 U. S. (5 How.) 233, 12 L. ed. 130; Craig v. Radford, 16 U. S. (3 Wheat.) 594, 4 L. ed. 467; Doe v. Robertson, 24 U. S. (11 Wheat.) 332, 6 L. ed. 488; Osterman v. Baldwin, 6 Wall. 116, 18 L. ed. 730; Governeur v. Robertson, 11 Wheat. 332, 6 L. ed. 488; Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Society etc. v. New Haven, 8 Wheat. 464, 5 L. ed. 662; Hepburn v. Dunlop, 1 Wheat. 179, 4 L. ed. 65; Robertson v. Miller, 1 Brock. (U. S.) 466, 20 Fed. Cas. No. 11,926; Society etc. v. Wheeler, 2 Gall (U. S.), 105, 22 Fed. Cas. No. 13,156; Stokes v. Dawes, 4 Mason (U. S.), 268, 23 Fed. Cas. No. 13,477; Farmers' L. & T. Co. v. McKinney, 6 McLean (U. S.), 1, 8 Fed. Cas. No. 4667; Donovan v. Pitcher, 53 Ala. 411, 25 Am. Rep. 634; Harley v. State, 40 Ala. 689; Jenkins v. Noel, 3 Stew. (Ala.) 60; Ferguson v. Neville, 61 Cal. 356; Fitzgerald v. Garvin, T. U. P. Charlt. (Ga.) 281; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84; Halstead v. Lake County, 56 Ind. 363; Murray v. Fishback, 5 B. Mon. (Ky.) 403; Dudley v. Grayson, 22 Ky. (6 T. B. Mon.) 259; Elmondorff v. Carmichael, 3 Litt. (Ky.)

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under the statute of the United States, and his right to convey such title is full and complete.[66] "That an alien may take by deed, or devise and hold against anyone but the sovereign, until office found, is a familiar principle of law, which it requires no citation of authorities to establish."[67] When Texas was a foreign country, its Constitution forbade aliens to hold real estate, but purchasers were competent to hold until office found, and if the sovereign did not exercise his prerogative, no one had a right to complain. When Texas was admitted into the Union the disability of alienage was removed.[68]

472, 14 Am. Dec. 86; Robasse's Succession, 47 La. Ann. 1452, 49 Am. St. Rep. 433, 17 South. 867; Thompson's Succession, 9 La. Ann. 96; Mussey v. Pierre, 24 Me. 559; Guyer v. Smith, 22 Md. 239, 85 Am. Dec. 650; Buchanan v. Deshon, 1 Har. & G. 280; McCreery v. Allender, 4 Har. & McH. 409; McCreery v. Wilson, 4 Har. & McH. 412; Cunningham v. Browning, 1 Bland (Md.), 308; Scanlan v. Wright, 13 Pick. 523, 25 Am. Dec. 344; Piper v. Richardson, 9 Met. (Mass.) 155; Corn v. Andre, 3 Pick. 224; Sheaffe v. O'Neil, 1 Mass. 256; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741; Wulf v. Manuel, 9 Mont. 279, 23 Pac. 723; Tibbitts v. Ah Tong, 4 Mont. 536, 2 Pac. 759; Carlow v. Aultman, 28 Neb. 672, 44 N. W. 873; Courtney v. Turner, 12 Nev. 345; Montgomery v. Dorion, 7 N. H. 475; O'Hanlin v. Van Kleeck, 20 N. J. L. 44; Munro v. Merchant, 28 N. Y. 9; Jackson v. Adams, 7 Wend. 367; Bradstreet v. Supervisors of Oneida County, 13 Wend. 546; Larreau v. Davignon, 5 Abb. Pr., N. S., 367; Wright v. Saddler, 20 N. Y. 320; Heeney v. Brooklyn Benev. Soc., 33 Barb. 360; Overing v. Russell, 32 Barb. 363; Goodell v. Jackson, 20 Johns. 693, 11 Am. Dec. 351; Matter of Windle, 2 Edw. Ch. 585; Mooers v. White, 6 Johns. Ch. 360; Trustees of University v. Miller, 14 N. C. (3 Dev.) 188; Blount v. Hornblea, 3 N. C. (2 Hayw.) 36; Bayard v. Singleton, 1 N. C. 5; McClenaghan v. McClenaghan, 1 Strob. Eq. (S. C.) 295, 47 Am. Dec. 532; Groves v. Gordon, 3 Brev. (S. C.) 245; Vaux v. Nesbit, 1 McCord Eq. 352; Jenney v. Laurens, 1 Speers, 356; Williams v. Wilson, Mart. & Y. (Tenn.) 248; Barrett v. Kelly, 31 Tex. 476; Clay v. Clay, 26 Tex. 24; Williams v. Bennett, 1 Tex. Civ. App. 498, 20 S. W. 856; State v. Boston etc. R. Co., 25 Vt. 433; Sands v. Lynham, 27 Gratt. (Va.) 291, 21 Am. Rep. 348; Ferguson v. Franklins, 6 Munf. (Va.) 305; Marshall v. Conrad, 5 Cal. 364; Oregon Mortg. Co. v. Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841; Irwin v. McBride, 23 U. C. Q. B. (Canada) 570; Doe v. Cleveland, 6 U. C. Q. B., O. S., 117; Murray v. Heron, 7 Grant Ch. (U. C.) 177; Doe v. Dickson, 2 U. C. Jur. (Canada) 326; Burk v. Brown, 2 Atk. 397; Theobolds v. Duffoy, 9 Mod. 104.

[66] Ferguson v. Neville, 61 Cal. 356.

[67] Cross v. Del Valle, 1 Wall. (68 U. S.) 8, 17 L. ed. 515.

[68] Osterman v. Baldwin, 6 Wall. (U. S.) 116, 18 L. ed. 730.

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§ 222. **Title in aliens when treaty made.**—As at common law, aliens are permitted to acquire title by act of the parties and to retain the title until the sovereign power forfeits it either by office found or by some act that, in legal effect, is its equivalent,[69] the titles of British subjects to lands in the United States, which would have been liable to forfeiture, by escheat, for the defect of alienage were completely protected by the sixth article of the treaty of peace between the United States and Great Britain of 1783, and by the ninth article of the treaty of 1794. The title of the parties under these treaties possesses the same validity as if they were citizens. It is sufficient for them to show that title was in them when the treaty was made, and it is not necessary that they should show an actual possession or seisin.[70]

An alien grantee of land had, under the Mexican law, the right to hold and possess it as his own property until he was deprived of it by the action of the sovereign authority or by the inquisition of denouncement.[71]

§ 223. **Taking by devise.**—Taking by devise is considred as a taking by purchase.[72] The New York statute provided that "If any alien resident of this state, or any naturalized or native citizen of the United States, who has purchased and taken, or who hereafter shall purchase and take, a conveyance of real es-

[69] Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38 L. ed. 532; Randall v. Jaques, 20 Fed. Cas. No. 11,553; Phillips v. Moore, 100 U. S. 208, 25 L. ed. 603; Orr v. Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613; Hammekin v. Clayton, 2 Woods (U. S.), 336, 11 Fed. Cas. No. 5996; Airhart v. Massieu, 98 U. S. 491, 25 L. ed. 213; Smith v. Zaner, 4 Ala. 99; Racouillat v. Sansevain, 32 Cal. 376; Ramires v. Kent, 2 Cal. 558; People v. Folsom, 5 Cal. 373; Norris v. Hoyt, 18 Cal. 217; Johnson v. Elkins, 1 App. Cas. (D. C.) 430; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741; Carlou v. Aultman, 28 Neb. 672, 44 N. W. 873; Gray v. Kauffman, 82 Tex. 65, 17 S. W. 513.

[70] Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613.

[71] De Merle v. Mathews, 26 Cal. 455.

[72] Mooers v. White, 6 Johns. Ch. (N. Y.) 360; Jones v. Minogue, 29 Ark. 637; Fox v. Southack, 12 Mass. 143; Marshall v. Conrad, 5 Call (Va.), 364; Vaux v. Nesbit, 1 McCord Eq. (S. C.) 352; Fairfax v. Hunter, 7 Cranch (U. S.), 603, 3 L. ed. 453; Stamm v. Bostwick, 122 N. Y. 48, 25 N. E. 233, 9 L. R. A. 597; Doehrel v. Hillmer, 102 Iowa, 169, 71 N. W. 204; Burrow v. Burrow, 98 Iowa, 400, 67 N. W. 287; Bennett v. Hibbert, 88 Iowa, 154, 55 N. W. 93.

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tate within this state, has died, or shall hereafter die, leaving persons who, according to the statutes of this state, would answer the description of heirs of such deceased person," such persons, whether they are citizens or aliens, are capable of taking and holding as heirs of such deceased person, as if they were citizens of the United States, the real estate owned and held by such deceased alien or citizen at the time of his death. It was held that the word "purchase" in this statute included an acquisition by devise.[73]

Generally, under statutes of a similar nature, it may be said that acquisition by devise is included under the term "purchase."[74] The method provided by statute must be followed to secure the escheat of a decedent's property for the nonexistence of heirs, and the question cannot be determined in a proceeding brought by an heir to restrain the escheator.[75] Hence, it is not proper for equity to enjoin proceedings to have an escheat declared, where, if escheat should be found, every question that might arise could be decided on a traverse,[76] and unless an *amicus curiae* has an interest or represents someone who has, he cannot move to quash an inquisition.[77]

§ 224. Foreign corporation purchasing stock of local corporation.—A foreign corporation cannot, as a device to enable it to hold real estate, purchase the capital stock of a local corporation. Such an act is a violation of the law prohibiting corporations from acquiring any real estate within the state unless authorized by law, and lands so held are subject to escheat.[78]

§ 225. Constitutional legislation.—An act relinquishing the land to the occupants, passed while proceedings by the escheator were pending, is constitutional,[79] and likewise a statute passed in a similar manner, providing that property of an illegitimate should go to his legitimate half-brothers, is valid.[80]

[73] Stamm v. Bostwick, 122 N. Y. 48, 25 N. E. 233, 9 L. R. A. 597.

[74] Burrow v. Burrow, 98 Iowa, 400, 67 N. W. 287; Bennett v. Hibbert, 88 Iowa, 154, 55 N. W. 93; Doehrel v. Hillmer, 102 Iowa, 169, 71 N. W. 204.

[75] Muir v. Thomson, 28 S. C. 499, 6 S. E. 309.

[76] Olmstead's Appeal, 86 Pa. 284.

[77] Dunlop v. Commonwealth, 2 Call (Va.), 284.

[78] Commonwealth v. New York L. E. & W. R. Co., 114 Pa. 340, 7 Atl. 756.

[79] State v. Tilghman, 14 Iowa, 474.

[80] Gresham v. Rickenbacher, 28 Ga. 227.

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The Constitution of California provides that "all estates of deceased persons who may have died without leaving a will or heir . . . . shall be and remain a perpetual fund," to be inviolably appropriated to the support of common schools throughout the state.[90] The supreme court of that state, however, held that the Constitution did not prevent the legislature from giving to nonresident foreigners the same rights relative to the acquisition, transmission and inheritance of property as were guaranteed by the Constitution to resident foreigners. This provision of the Constitution was held not to limit the power of the legislature to declare that aliens may be heirs.[91]

Under the statute of Virginia, children who are born in that state have the capacity of inheriting through living alien ancestors, and, consequently, children born of alien parents who reside in that state are entitled to inherit real estate, and likewise children born in another state may inherit in Virginia.[92] Unless, however, there is some prohibition, the general rule is that an alien friend may enforce his rights to the same extent as a citizen, and may maintain actions of ejectment or partition.[93] The objection that an alien is incapacitated from maintaining an action should be raised by plea in abatement.[94]

[90] Cal. Const., art. IX, sec. 4.

[91] State v. Smith, 70 Cal. 153, 12 Pac. 121.

[92] Hannon v. Hounihan, 85 Va. 429, 12 S. E. 157.

[93] Bonaparte v. Camden etc. R. Co., Baldw. (U. S.) 205, 3 Fed. Cas. No. 1617; Fisher v. Harnden, 1 Paine (U. S.), 55, 9 Fed. Cas. No. 4819; Shanks v. Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Jones v. McMasters, 20 How. (U. S.) 8, 15 L. ed. 805; Den v. Brown, 7 N. J. L. 305; Peck v. Young, 26 Wend. (N. Y.) 613; Young v. Peck, 21 Wend. (N. Y.) 389; Utassy v. Giedinghagen, 132 Mo. 53, 33 S. W. 444; Farley v. Shippen, Wythe (Va.), 254; White v. Sabariego, 23 Tex. 243; Ortiz v. De Benavides, 61 Tex. 60; Nolan v. Command, 11 N. Y. Civ. Proc. 295; Scanlan v. Wright, 13 Pick. 523, 25 Am. Dec. 344; Cryer v. Andrews, 11 Tex. 170; Schultze v. Schultze, 144 Ill. 290, 36 Am. St. Rep. 432, 33 N. E. 201, 19 L. R. A. 90; Scharpf v. Schmidt, 172 Ill. 255, 50 N. E. 182. A suit may be maintained by an alien mortgagee to foreclose his mortgage. Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Richmond v. Milne, 17 La. 312, 36 Am. Dec. 613. But see Siemssen v. Bofer, 6 Cal. 250; Norris v. Hoyt, 18 Cal. 217; Barges v. Hogg, 2 N. C. 485; Barrett v. Kelly, 31 Tex. 476; Hardy v. De Leon, 5 Tex. 211; Guyer v. Smith, 22 Md. 239, 85 Am. Dec. 650.

[94] Rateau v. Bernard, 3 Blatchf. (U. S.) Fed. Cas. No. 11,579; (U. S.), 336, 3

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§ 228. Alien has no inheritable blood.—Not only is an alien incapable at common law of inheriting real estate, but he is also incapable of transmitting an interest to a citizen, not under the disability of alienage, as the alien possesses no inheritable blood. An incapacity to transmit land to heirs is one of the disabilities of alienage.[95] On this principle neither dower nor curtesy in the real estate can be allowed to the wife or husband of an alien, as the alien has no power to transmit real estate by descent.[96]

§ 229. Right of alien to take personal property.—The disability that attaches to an alien and that at common law incapacitates him from inheriting real estate does not exist where personal property is concerned. He has the same power to take and hold personal property as a citizen.[97] Nonresident stockholders of a corporation acquire and hold their shares of stock with all the rights and privileges which pertain to them in the hands of citizens. If no other qualifications for directors are

Fed. Cas. No. 1219; McNair v. Toler, 21 Minn. 175; Lee v. Salinas, 15 Tex. 495; Shivers v. Wilson, 5 Har. & J. (Md.) 130, 9 Am. Dec. 497; Martin v. Woods, 9 Mass. 377; Burnside v. Matthews, 54 N. Y. 78; Educational Society v. Varney, 54 N. H. 376.

[95] Blight v. Rochester, 7 Wheat. (U. S.) 535, 5 L. ed. 516; Rubeck v. Gardner, 7 Watts (Pa), 455; Jones v. Minogue, 29 Ark. 637; Doe v. Lazenby, Smith (Ind.), 203, 1 Ind. 234; Smith v. Zaner, 4 Ala. 99; De Graff v. Went. 164 Ill. 485, 45 N. E. 1075; Purczell v. Smidt, 21 Iowa, 540; Richmond v. Milne, 17 La. 312, 36 Am. Dec. 613; Stevenson v. Dunlap, 7 T. B. Mon. (Ky.) 134; Slater v. Nason, 15 Pick. (Mass.) 345; Farrar v. Dean, 24 Mo. 16; Hinkle v. Shadden, 2 Swan (Tenn.), 46; De Wolf v. Middleton, 18 R. I. 814, 26 Atl. 44, 31 Atl. 271 R. A. 146; Sands v. Lyn Gratt. (Va.) 21 Am. Re

[96] Coxe v. Gulick, 10 N. J. L. 328; Mobile Cong. Church v. Morris, 8 Ala. 182.

[97] Meier v. Lee, 106 Iowa, 303, 76 N. W. 712; Greenheld v. Morrison, 21 Iowa, 538; Evans' Appeal, 51 Conn. 435; Crosgrove v. Crosgrove, 69 Conn. 416, 38 Atl. 219; Kerr v. White, 52 Ga. 362; Ludlow v. Van Ness, 8 Bosw. (N. Y.) 178; Richmond v. Milne, 17 La. 312, 36 Am. Dec. 613; Greenia v. Greenia, 14 Mo. 526; Harney v. Donohoe, 97 Mo. 141, 10 S. W. 191; Bradwell v. Weeks, 1 Johns. Ch. (N. Y.) 206; Beck v. McGillis, 9 Barb. (N. Y.) 35; Meakings v. Cromwell, 5 N. Y. 136; Corrie's Case, 2 Bland (Md.), 488; Megrath v. Robertson, 1 Desaus. (S. C.) 445; Polk v. Ralston, 2 Humph. (Tenn.) 537; Commonwealth v. Detwiller, 131 Pa. 614, 18 Atl. 990, 7 L. R. A. 357.

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required than ownership of stock, such aliens may become directors.[98]

§ 230. Treaties removing disability of aliens to inherit.—All laws of a state contrary to the provisions of a treaty are void. A treaty may remove the disability of an alien to inherit, and it is undoubted that treaties conferring upon aliens the right to inherit are within the scope of the treaty-making power of the United States. "That the treaty power of the United States," said Mr. Justice Field, "extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."[99]

The court said that the article of the treaty in question in the case just cited was not happily drawn, but that by its evident mean-

[98] Commonwealth v. Detwiller, 131 Pa. 614, 18 Atl. 990, 7 L. R. A. 357.

[99] De Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. Rep. 295, 33 L. ed. 642. See, also, Bahuaud v. Bize, 105 Fed. 485.

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ing the disability of alienage was removed, and that citizens of France could take land in the District of Columbia by descent from citizens of the United States, notwithstanding the common law which prevailed in the District excluded aliens from inheriting lands from a citizen.[100]

§ 231. Treaty admitting of two constructions.—Where two constructions may be placed upon a treaty, one restrictive as to the rights that may be claimed under it, and the other liberal, the liberal construction will be preferred. An alien died in Virginia, intestate and without children, owning at the time of his death real property in that state. The escheator prosecuted an inquisition for the forfeiture of the estate, recovered judgment, and was about to sell, when certain heirs, citizens of Switzerland, filed a petition in pursuance of the laws of Virginia, alleging that they were the heirs at law of the deceased, and praying that the proceeds of the sale of the property should be turned over to them, but the state court was of the opinion that conceding the fact of their heirship, they had no valid claim.

The treaty between the United States and the Swiss Confederation of November 25, 1850, provided, in article V, that as to personal property, the fullest power to dispose of the same should be given, and as to real estate provided: "The foregoing provisions shall be applicable to real estate situate within the States of the American Union, or within the cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate. But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, *there shall be accorded*

[100] De Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. Rep. 295, 33 L. ed. 642. The seventh article of the convention between the United States and France concluded February 23, 1853, before the court in that case for construction, provided: "In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament or otherwise, just as those citizens themselves; and in no case

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to the said heir, or other successor, such term as the laws of the State, or the canton, will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated."

§ 232. Contention of State.—It was contended on behalf of the state of Virginia that the state having fixed no time within which the alien heir might sell the property and "withdraw and export the proceeds thereof without difficulty," it could not be done at all. Under this construction the entire provision would become a nullity. Mr. Justice Swayne, however, delivering the opinion of the court, said as to this contention: "The terms of the limitation imply clearly that *some time,* and not that *none,* was to be allowed. If it had been proposed to those who negotiated the treaty to express in it the effect of this construction in plain language, can it be doubted that it would have been promptly rejected by both sides as a solecism and contrary to the intent of the parties? Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred."[101]

§ 233. Ruling of court.—The court held that the treaty was within the treaty-making power conferred by the Constitution, and it was the duty of the court to give it full effect. "If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the states are expressly

shall they be subjected to taxes for transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

"As to the States of the Union by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

"In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens." (10 Stats. 996.)

[101] Hauenstein v. Lynham, 100 U. S. (10 Otto) 483, 25 L. ed. 628.

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forbidden to 'enter into any treaty, alliance or confederation.'"[102] The construction of treaties should be liberal so as to effectuate the apparent intention of the parties to secure equality and reciprocity between them.[103]

§ 234. Other decisions of supreme court of the United States.—The ninth article of the treaty of 1794 between the United States and Great Britain provided: "It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the same to whom they please, in like manner as if they were natives, and that neither they nor their heirs or assigns shall, so far as respects the said lands and the legal remedies incident thereto, be considered as aliens."

Where an alien was in complete possession and seizure of land which continued up to and after the making of this treaty, it was held that as the treaty was the supreme law of the land, it confirmed the title to him and his heirs and assigns, and protected him from any forfeiture by reason of alienage. Although the state of Virginia, in which the lands were situated, once had the power to have vested the estate completely, in itself or grantee, by an inquest of office or equivalent proceeding, yet as it failed to do so, its inchoate title and the derivative title of its grantee became, through the action of the treaty, ineffectual and void.[104]

Under the treaty of 1778 between the United States and France, the citizens of either country were permitted to hold lands in the other. The abrogation of the treaty did not devest the title to lands once vested in a French subject.[105] "Where a treaty is the law of the land, and as such affects the rights of the parties litigant in court, that treaty as such binds their rights, and is as much to be regarded by the court as an act of Congress." On this principle it was held that a stipulation in a

[102] Hauenstein v. Lynham, supra.

[103] De Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. Rep. 295, 33 L. ed. 642.

[104] Fairfax's Devisee v. Hunter's Lessee, 7 Cranch (U. S.), 603, 3 L. ed. 453.

[105] Carneal v. Banks, 10 Wheat. (U. S.) 181, 6 L. ed. 297.

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treaty that property shall be restored operated as an immediate restoration, and annulled a judgment of condemnation previously made.[106]

§ 235. Same subject.—A native of France, John Baptiste Chirac, came to the United States in 1793, located in Maryland, took in 1795 the oath of citizenship according to the form prescribed by the laws of Maryland, and subsequently received a conveyance in fee of land situated in that state. Some years later he was naturalized in compliance with the laws of the United States, and the following year died intestate, leaving no legitimate relations except certain natives and residents of France. The state of Maryland, on the assumption that the lands were subject to escheat, conveyed them to the natural son of the decedent, with a saving of the rights of all persons claiming by devise or descent from the intestate. The French heirs, aliens, brought an action in ejectment for the land and recovered judgment. The point raised was that the estate of the French decedent was in his lifetime escheatable, because it was acquired before he became a citizen of the United States, the law of the state of Maryland, according to which he took the oaths of citizenship, having been virtually repealed by the Constitution of the United States and the naturalization law enacted by Congress. The statute of Maryland required that a French subject, who would entitle himself under it to hold lands in fee, should be a citizen according to the law which should be in force at the time of the acquisition of the estate, otherwise he could only purchase or hold for life or years. The decedent was not, according to that law, a citizen when he purchased.

Mr. Chief Justice Marshall, delivering the opinion of the court, said: "It is unnecessary to inquire into the consequences of this state of things, because we are all of opinion that the treaty between the United States and France, ratified in 1778, enabled the subjects of France to hold lands in the United States. That treaty declared that 'The subjects and inhabitants of the United States, or any one of them, shall not be reputed aubains [that is, aliens] in France.' 'They may by testament, donation or otherwise, dispose of their goods, movable and immovable, in favor of such persons as to them shall seem good; and their

[106] United States v. The Peggy, 1 Cranch, 109, 2 L. ed. 49.

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heirs, subjects of the said United States, whether residing in France or elsewhere, may succeed them *ab intestato*, without being obliged to obtain letters of naturalization. The subjects of the most Christian king shall enjoy, on their part, in all the dominions of the said states, an entire and perfect reciprocity relative to the stipulations contained in the present articles.' Upon every principle of fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States.

"It is unnecessary to inquire into the effect of this treaty under the confederation, because before John Baptiste Chirac emigrated to the United States the confederation had yielded to our present Constitution, and this treaty had become the supreme law of the land. The repeal of the treaty could not affect the real estate acquired by John Baptiste Chirac, because he was then a naturalized citizen, conformably to the act of Congress, and no longer required the protection given by treaty."[107] At the time of the death of Chirac, he being seised in fee and his heirs being subjects of France, there was between the two nations no treaty in existence, and hence arose the question, Did the land pass to his heirs or become escheatable? The law of Maryland provided that if any subject of France, who should become a citizen of Maryland, should die intestate, "the natural kindred of such decedent, whether in France or elsewhere, shall inherit his or her real estate, in like manner as if such decedent and his kindred were the citizens of this state." For the purpose of avoiding the effect of this claim in the act, it was contended that it was passed for the sole purpose of enforcing the treaty, and when the treaty was repealed, it was also repealed by implication. The court did not agree with this contention, saying: "The enactment of the law is positive, and its terms perpetual. Its provisions are not made dependent on the treaty, and although the peculiar state of things then existing might constitute the principal motive for the law, the act remains in force from its words, however that state of things may change." Another treaty was passed between France and the United States, and the court held that this treaty gave French subjects the rights of citizens, so far as respects property, and dispensed with the

[107] Chirac v. Lessee of Chirac, 2 Wheat. (U. S.) 259, 4 L. ed. 234.

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necessity of obtaining letters of naturalization, and by removing the incapacity of alienage placed French subjects in the same situation with respect to lands as if they had become citizens.[108]

§ 236. **Same subject—Treaties of 1783 and 1794.**—The Revolution did not affect the capacity of British subjects or corporations created by the Crown in this country to hold lands. The treaty of peace of 1783 protected the property of British corporations to the same extent as that of natural persons. The treaty of 1794 confirmed the title thus protected, so that no intermediate legislative act or other proceeding for the defect of alienage could forfeit it. Property rights vested under a treaty are not devested by a termination of the treaty by war.[109] But British subjects who were born before the Revolution are as incapable as those born afterward of inheriting or transmitting the inheritance of lands, and the treaties of 1783 and 1794 provide only for titles existing at the time of the execution of the treaties, and not to titles subsequently acquired. Under these treaties actual possession was not necessary to entitle a person to their benefit, but the existence of title at the time was essential.[110] Accordingly, where a British subject came to the United States after the execution of the treaty of 1783 and before the signature of the treaty of 1794, and died, seised of lands, the title of his heirs was not protected by the treaties.[111] The titles of British subjects to lands in the United States which would have been liable to forfeiture by escheat for the defect of alienage were completely protected by the sixth article of the treaty of peace of 1783. It was not intended that this article should be confined to confiscations *jure belli*. By the ninth article of the treaty of 1794, the titles of British subjects, whatever such titles may be, are given the same validity as if the parties were citizens. But this article did not intend to include any other persons than those who were American citizens or British subjects.[112]

[108] Chirac v. Lessee of Chirac, 2 Wheat. (U. S.) 259, 4 L. ed. 234.

[109] Society etc. v. Town of New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662.

[110] Bright's Lessee v. Rochester, 7 Wheat. 535, 5 L. ed. 516; Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142.

[111] Bright's Lessee v. Rochester, 7 Wheat. 535, 5 L. ed. 516.

[112] Orr v. Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613.

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Yet under the ninth article of the treaty of 1794 the parties in an action of ejectment must show that the title to the land was in them or their ancestors at the time when the treaty was made.[113] The treaty of 1783 operated upon the condition of affairs existing at that period, and all persons who then adhered to the American states were, whether natives or otherwise, virtually absolved from all allegiance to the British crown. All those, on the other hand, who then adhered to the British crown were considered subjects of that crown. The marriage of an American woman with a British officer did not change her allegiance to her state, as marriage with an alien, whether friend or enemy, creates no dissolution of the native allegiance of the wife, but her subsequent removal with her husband operated as a virtual dissolution of her allegiance, and established her future allegiance to the British crown by the treaty of 1783.[114] The title of an alien mortgagee is protected by the treaty. But he would have this right independently of the treaty, as his demand is merely a personal one; the debt being the principal and the land an incident.[115] The title that a British-born subject might acquire during the Revolution was defeasible, but after the treaty became completely protected.[116]

The treaty with France supersedes the Constitution and statutes of Nebraska prohibiting nonresident aliens from acquiring real estate by inheritance or otherwise.[117]

§ 237. **Expression of executive department of government.**—At various times the question of the extent to which treaties would supersede state laws relative to the succession of estates has been considered by the officers of the executive department of the government. In 1857 Mr. Cushing, while acting as attorney general, speaking of the treaty of 1828 with Prussia, which provided for the disposition of personal and real estate in each

[113] Harden v. Fisher, 1 Wheat. (U. S.) 300, 4 L. ed. 96.

[114] Shanks v. Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666.

[115] Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142.

[116] Craig v. Radford, 3 Wheat. 594, 4 L. ed. 467. In Lessee of Pollard's Heirs v. Kibbe, 14 Pet. 353, 10 L. ed. 490, involving title to a lot of ground in the city of Mobile, Mr. Justice Baldwin, in a concurring opinion, reviews various cases in which rights secured by treaties have been enforced.

[117] Bahuaud v. Bize, 105 Fed. 485.

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country by the citizens of the other, declared that it was "a stipulation of treaty constitutional in substance and form; which, as such, is the supreme law of the land, and which abrogates any incompatible law of either of the States." [118]

Mr. Livingston, Secretary of State, in a note to Mr. de Sacken, Russian chargé, dated June 13, 1831, stated: "By the Federal Constitution, the several states retained all the attributes of sovereignty which were not granted to the general government. The right of regulating successions in relation to the subject in question is not among those conceded rights; consequently it was reserved to, and is still vested in, the several states. But by the same Constitution it is provided that treaties made under the authority of the general government shall be the supreme law of the land, anything in the constitution or laws of a state to the contrary notwithstanding. This very brief exposition shows at once the cause of the want of comity in the laws of the United States to which you advert, and indicates the remedy which a treaty between the nations would effectually apply." [119] Mr. Fish, Secretary of State in 1874, in a note to Aristarchi Bey, explained that "the estates of decedents are administered upon and settled in the United States under the laws of the state of which the decedent was a resident at the time of his death, and on this account, in the absence of any treaty regulations on the subject, interference in the disposition of such measures as may be prescribed by the laws of the particular state in such cases is not within the province of the federal authorities." [120]

In 1870, while the government was considering the negotiation of a treaty with Baden regulating inheritances and marriages, Mr. Fish, Secretary of State, owing to doubts that had been raised by extreme constructionists as to the power under the Constitution to conclude such a treaty, doubts which, he said, he did not share, thought it wise, in advance of any negotiations, to secure an expression of opinion from the Senate, through the chairman of the Committee on Foreign Relations. This committee "advised the negotiations of a treaty" for the purposes specified, if possible.[121]

[118] 8 Op. Atty. Gen. 417.

[119] MS. Notes to Foreign Legations, IV, 396.

[120] MS. Notes to Turkey, I, 115.

[121] 5 Moore Int. L. D. 178; Davis' Notes, Treaty Vol. 1776-1887, 1239; MS. Inst. Prussia, XV, 121.

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§ 238. **Dissent from these views.**—Mr. Bayard, while admitting that treaties removing disabilities had been held to be valid, stated: "Were the question whether a treaty provision which gives to aliens rights to real estate in the states to come up now for the first time, grave doubts might be entertained as to how far such a treaty would be constitutional. A treaty is, it is true, the supreme law of the land, but it is nevertheless only a law imposed by the federal government, and subject to all the limitations of other laws imposed by the same authority. While internationally binding the United States to the other contracting powers, it may be municipally inoperative, because it deals with matters in the states as to which the federal government has no right to deal. That a treaty, however, can give to aliens such rights has been repeatedly affirmed by the supreme court of the United States;[122] and consequently, however much hesitation there might be as to advising a new treaty containing such provisions, it is not open to this Department to deny that the treaties now in existence giving rights of this class to aliens may, in their municipal relations, be regarded as operative in the states."[123]

§ 239. **In California.**—In California at an early day a statute was passed requiring foreigners to procure a license for the privilege of mining in the state, and prohibiting all foreigners who had not obtained such a license from working the mines. A proceeding in the nature of a *quo warranto* was instituted by the attorney general to procure the opinion of the court upon the validity of the law. Among other grounds urged was that the act was in conflict with treaties with foreign nations, and with the treaty of Queretaro in particular. The court held that the states possessed the inherent power of taxation, and that its limitation and extent must, with respect to subject matter, persons, amounts and times of payment, reside in the discretion of the government of each state, and that if it saw fit to impose the

[122] Citing Chirac v. Chirac, 2 Wheat. 259, 4 L. ed. 234; Carneal v. Banks, 10 Wheat. 181, 6 L. ed. 297; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628.

[123] Mr. Bayard, Secretary of State, to Mr. Miller, June 15, 1886, 160 MS. Dom. Let. 481; 5 Moore Int. L. D. 179. See as a similar opinion expressed by Attorney General Wirt, in 1819, 1 Op. Atty. Gen. 275.

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burden of taxation upon a portion of the persons within the sphere of its jurisdiction, and specially to exempt others, its legislation, though it might be subject to the charge of being unequal and unjust, would not infringe upon any principle of the Constitution of the United States. As to the objection that the act was in violation of treaties with foreign powers, the court said that it was a sufficient answer to this general objection that the complaint did not state the nationality of any person from whom it was sought to collect the tax, but waiving this point, the court held that the power of taxation over foreigners could not be taken away by Congress or by treaties with foreign nations.[124]

[124] People v. Naglee, 1 Cal. 249, 52 Am. Dec. 312. Said the court: "But it is contended that the Act of the Legislature is in violation of treaties of the United States with foreign powers. A sufficient answer to this general objection is, that the complaint does not set forth the nationality of any person upon whom the respondent is alleged to have exercised the functions of his office. It charges that he 'has exacted the sum of twenty dollars each from sundry foreigners in the County of San Francisco for licenses to mine'—without particularizing whether such foreigners were citizens of a nation with which the United States have any treaty relations. It does not state whether they are Mexicans, Chilenos, Englishmen, Frenchmen, Sandwich Islanders or Chinese; and the Court cannot, upon this demurrer, determine whether any treaty has been violated by the respondent. This difficulty alone would, upon this branch of the plaintiff's argument, be a serious objection to his case; inasmuch as it may be more satisfactory to have the whole matter, so far as this Court is concerned, disposed of in all points upon the merits, rather than upon inadvertences which might be supplied, or corrected in a subsequent litigation, we shall proceed to examine this position of the plaintiff's counsel. He insists that the Act is invalid because it is opposed generally to treaties of the United States with foreign powers, and particularly to the treaty of Queretaro.

"First, as to treaties generally. Perhaps the most satisfactory mode of testing the validity of the law, under this point, will be to take the treaty with that power to whose subjects as extensive privileges are granted by our country as to those of any other nation. We will, therefore, consider the case as if it involved our treaty relations with Great Britain, and under the supposition that a subject of the Queen of Great Britain was the person from whom the sum of twenty dollars had been exacted. By the 14th Article of the Treaty of 1794 (known as Jay's Treaty), which was substantially renewed by Article 1 of the Treaty of 1815, the subjects of the King of Great Britain, coming from his majesty's territories in Europe, had granted to them liberty freely and securely, and without hindrance or molestation, to come with their ships and cargoes, to the lands, countries, cities, ports, places and

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§ 240. Constitutionality of statutes.—In a later case in California, an act levying on each person of the Mongolian race residing in the state, except such as should take out licenses to

rivers within our territories, and enter the same, to resort there, to remain and reside there, without limitation of time; and reciprocal liberty was granted to the people of the United States in his majesty's European territories; *but subject always, as respects this article, to the laws and statutes of the two countries respectively.* By this treaty, our inhabitants, whilst in the British dominions were to abide by the laws of Great Britain; and the subjects and inhabitants of that country, when in our territories, were to abide by the laws of the United States and by the laws of the respective States where they might be. The only question, then, under this treaty is, whether the Act of the Legislature falls within the scope of the powers of a sovereign nation, and, at the same time, is not included in the category of powers granted by the States to the General Government; for, if it falls within the former, and is excluded from the latter, then it is one of the laws which the treaty itself makes obligatory upon British subjects. But we have seen that the power of taxation, and the power of prescribing the conditions upon which aliens shall be permitted to reside in a State, are attributes of a sovereign nation, which have not, except in certain specified cases, of which the present is not one, been given up to the Federal Government. Our statute, then, is one of the laws or statutes, to which the treaty, by its own terms, provides that the subjects of Great Britain shall be subject. Chief Justice Taney, in speaking of this treaty in Norris v. The City of Boston, and Smith v. Turner (7 How. 472), 12 L. ed. 724, uses the following language: 'The permission there mutually given to reside and hire houses and warehouses and to trade and traffic, is in express terms made subject to the law of the two countries respectively. Now the privileges here given within the several States are all regulated by State laws, and the reference to the laws of this country necessarily applied to them, and subjects the foreigner to their decision and control.'

"The Act, then, is not repugnant to that Treaty. But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the State law give way. The question in such case would not be solely what is provided for by the treaty, but whether the State retained the power to enact the contested law, or had given up that power, to the General Government. If the State retains the power, then the President and Senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making Department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an Act of Congress which transcends the constitutional authority of that body, it cannot supersede a State law which enforces or exercises any power of the State not granted away by the Constitution. To hold

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work in the mines or to prosecute some kind of business, a monthly tax, was held to be unconstitutional, because it was in violation of the provision of the Constitution of the United States giving

any other doctrine than this, would, if carried out into its ultimate consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective States, or which should even undertake to cede away a part, or the whole of the acknowledged territory of one of the States to a foreign nation. In the License Cases (5 How. 603, 12 L. ed. 300) Mr. Justice Daniels, speaking of the provisions of the Constitution in relation to treaties, holds the following language: 'This provision of the Constitution, it is to be feared, is sometimes expounded without those qualifications which the character of the parties to this instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the Federal Government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe, that these ever were, either in intention or in fact, ceded to the General Government. Laws of the United States, in order to be binding must be within the legitimate powers vested by the Constitution. Treaties, in order to be valid, must be made within the scope of the same power, for there can be no *authority of the United States*, save what is derived mediately or immediately, and regularly, and legitimately from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away one right of a State, or of any citizen of a State.' It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation. 'If,' says Chief Justice Taney (7 How. 466, 12 L. ed. 779), 'the United States have the power, then any legislation by the State in law, would also be void, and this Court bound to disregard it.'

"And here let us remark that the questions which we have been examining are questions of *power*, and not questions of justice, or policy, or expediency. We hold that the *power* of taxation over foreigners, as well as of determining the conditions on which they shall be permitted to enjoy the protection of the State in a particular place or occupation, is, in the language of the Supreme Court of the United States, 'perfect and undiminished and indispensable,' and that it cannot be taken away or impaired by Acts of Congress or Treaties with foreign nations; and that the justice and expediency of tax and license laws must, so far as foreigners are concerned whilst residing within our territorial limits, be left to the discretion of the States respectively, to be exercised as the wisdom of their Legislatures shall dictate, subject only to such restrictions as may be imposed by the organic laws of the several States." People v. Naglee, 1 Cal. 245-248, 52 Am. Dec. 312.

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Congress power to regulate commerce with foreign nations.[125] Mr. Justice Field, who afterward became an associate justice of the supreme court of the United States, dissented, and stated that he concurred fully in the opinion expressed in People v. Naglee,[126] as to the powers of the state to tax foreigners as a class.[127] It was, however, recognized at an early day that treaties might remove the disability of aliens to inherit.[128] It was contended that this principle would permit the federal government to control the internal policy of the states, but the court answered that this was one of the results of the national compact.[129]

[125] Lin Sing v. Washburn, 20 Cal. 534.

[126] 1 Cal. 249, 52 Am. Dec. 312.

[127] Lin Sing v. Washburn, 20 Cal. 534. That the constitutional provision that taxation shall be equal and uniform throughout the state has application only to direct taxation upon property, see People v. Coleman, 4 Cal. 46, 52, 60 Am. Dec. 586, and note; People v. McCreery, 34 Cal. 448, 450. As to the power of a state to enact license laws, see note to People v. Mayor of Brooklyn, 55 Am. Dec. 288; note to Ash v. People, 83 Am. Dec. 742; note to Allentown v. Telegraph Co., 52 Am. St. Rep. 246. A statute imposing a tax upon a foreign corporation doing business in the state does not violate the federal Constitution. Southern B. & L. Assn. v. Norman, 98 Ky. 294, 56 Am. St. Rep. 367, 32 S. W. 952, 31 L. R. A. 41. A state has the power to impose upon corporations of other states a tax for the privilege of doing business, although no equivalent tax is imposed upon its domestic corporations. Commonwealth v. Melton, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522; Attorney General v. Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 717. But see as to taxing a foreign corporation in a different mode from domestic corporations, Erie Ry. Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226.

[128] People v. Gerke, 5 Cal. 381.

[129] People v. Gerke, 5 Cal. 381. Mr. Justice Heydenfeldt said: "The Attorney General, in support of the information filed in this case, denies the power of the Federal Government to make such a provision by treaty, and the determination of this case depends upon the solution of that question. Cases have frequently arisen where aliens have claimed to inherit by virtue of treaty provisions analogous to the one under consideration, and in all of them, so far as I have examined, the stipulations were enforced in favor of the foreign claimants. See Chirac v. Chirac, 2 Wheat. 259, 4 L. ed. 234, 4 Wheat. 453, 4 L. ed. 613, 8 Wheat. 464, 5 L. ed. 662, 9 Wheat. 489, 6 L. ed. 142, 10 Wheat. 181, 6 L. ed. 297.

"But in none of these cases was the question raised as to the power of the Federal Government to make the treaty. It has been the practice of the Government from an early period after the ratification of the Constitution, and its power is now, I believe, for the first time disputed.

"The language which grants the power to make treaties, contains no

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Shortly afterward the supreme court of that state decided that as a nonresident alien could not inherit land, he could not maintain ejectment, and that the treaty between the United States

words of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the Federal Government would be ineffectual, and the reserved rights of the States would be subverted. The principle of construction as applied, not only in reference to the Constitution of the United States, but particularly in the relation of all the rest of it to the treaty-making grant, was recognized both by Mr. Jefferson and John Adams, two leaders of opposite schools of construction. See Jefferson's Works, vol. III, p. 135; and vol. VI, p. 560.

"It may, therefore, be assumed that, aside from the limitations and prohibitions of the Constitution upon the powers of the Federal Government, 'the power of treaty was given, without restraining it to particular objects, in as plenipotentiary a form as held by any sovereign in any other society.' This principle, as broadly as I have deemed proper to lay it down, results from the form and necessities of our Government, as elicited by a general view of the Federal compact. Before the compact, the States had the power of treaty making as potentially as any power on earth; it extended to every subject whatever. By the compact, they expressly granted it to the Federal Government in general terms, and prohibited it to themselves.

"The General Government must, therefore, hold it as fully as the States held who granted it, with the exceptions which necessarily flow from a proper construction of the other powers granted, and those prohibited by the Constitution. The only questions, then, which can arise in the consideration of the validity of a treaty, are: First, Is it a proper subject of treaty according to international law or the usage and practice of civilized nations? Second, Is it prohibited by any of the limitations in the Constitution?

"Taking for illustration the present subject of treaty, no one will deny that, to the commercial States of the Union, and indeed to the citizens of any State who are engaged in foreign commerce, a stipulation to remove the disability of aliens to hold property is of paramount importance or, at any rate, it may be so considered by the States, and demanded as a part of their commercial polity.

"Now, as by the compact the States are absolutely prohibited from making treaties, if the General Government has not the power, then we must admit a lameness and incompleteness in our whole system, which renders us inferior to any other enlightened nation, in the power and ability to advance the prosperity of the people we govern.

"Mr. Calhoun, in his discourse on the Constitution and Government of the United States, has given to this power a full consideration, and I cannot doubt that the view which I have taken is sustained by his reasoning. According to his opinion, the following may be classed as the limitations on the treaty-making power: First, it is limited strictly to questions *inter*

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and the Hanseatic towns had not enlarged the rights of natives of the latter in this respect, because the treaty conferred upon them only the right to dispose of land, which they were inca-

alios, 'all such clearly appertain to it.' Second. 'By all the provisions of the Constitution which inhibit certain acts from being done by the Government or any of its departments.' Third, 'By such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary.' Fourth, 'It can enter into no stipulation calculated to change the character of the Government, or to do that which can only be done by the Constitution making power; or which is inconsistent with the nature and structure of the Government or the objects for which it was formed.'

"Having stated these as the only limitations, the author adds, 'Within these limits all questions which may arise between us and other powers, be the object what it may, fall within the limits of the treaty making power, and may be adjusted by it.'

"One of the arguments at the bar against the extent of this power of treaty is, that it permits the Federal Government to control the internal policy of the States, and, in the present case, to alter materially the statutes of distribution.

"If this was to the full extent claimed, it might be a sufficient answer to say, that it is one of the results of the compact, and, if the grant be considered too improvident for the safety of the States, the evil can be remedied by the constitution making power. I think, however, that no such consequence follows as is insisted. The statutes of distribution are not altered or affected. Alienage is the subject of the treaty. Its disability results from political reasons which arose at an early period of the history of civilization, and which the enlightened advancement of modern times, and changes in the political and social conditions of nations, have rendered without force or consequence. The disability to succeed to property is alone removed, the character of the person is made politically to undergo a change, and then the statute of distribution is left to its full effect, unaltered and unimpaired in word or sense. If there is one object more than another which belongs to our political relations, and which ought to be the subject of treaty regulations, it is the extension of this comity which is so highly favored by the liberal spirit of the age, and so conducive in its tendency to the peace and amity of nations. Even if the effect of this power was to abrogate to some extent the legislation of the States, we have authority for admitting it, if it does not exceed the limitations which we have cited from the work of Mr. Calhoun, and laid down as the rule to which we yield our assent.

"During the war of the Revolution, the States had passed Acts of confiscation; Acts against the collection of debts due to the subjects of Great Britain; and Acts for the punishment of treason. By the treaty of peace, the effects of these various Acts were provided against; and as late as 1792, long after the ratification of the Constitution, Mr. Jefferson, in answer to the complaint of the British Minister, Mr. Hammond, distinctly recognized the doctrine, that treaties are the supreme law of the land, and that State legislation must yield to

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pacitated from inheriting by reason of their alienage. Mr. Justice Murray, who delivered the opinion of the court, said that while the court had affirmed the constitutionality of a similar

them; and he therein cites the Acts of State Legislatures and the decisions of State Judges, who all conform to the same opinion. See vol. III, Jefferson's Works, 365.

"I see no danger which can result from yielding to the Federal Government the full extent of powers which it may claim from the plain language, intent, and meaning of the grant under consideration. Upon some subjects, the policy of a State Government, as shown by her legislation, is dependent upon the policy of foreign governments, and would be readily changed upon the principle of mutual concession. This can only be effected by the action of that branch of the State sovereignty known as the General Government, and when effected, the State policy must give way to that adopted by the governmental agent of her foreign relations.

"It results from these views, that the treaty of 1828, with Prussia, is valid, and that aliens, subjects of Prussia, are protected by its provisions."

Mr. Justice Bryan said: "I agree with my associate, that the doctrine has been settled in the United States Courts, in cases relating to analogous treaties to the one in question, that the Courts of the country should extend to aliens the full protection which the treaty seeks to give them, in the acquisition or distribution of property.

"In Chirac v. Chirac, 2 Wheat. 259, 4 L. ed. 234, the treaty with France of 1778, was passed upon, and it was decided by the United States Court, that it secured to the citizens and subjects of either power, the privilege of holding lands in the territory of the other. This was reaffirmed in Cavneac v. Banks, 10 Wheat. 189, 6 L. ed. 297. A similar provision of the treaty with Great Britain of 1794, was also sanctioned by the Supreme Court of the United States, in Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142. So far as the authority of the Federal Courts is concerned, they appear to have uniformly administered the law upon the meaning given by construction to the language of the treaty, seeming never to have, in any respect, doubted the power of the General Government to provide by treaty with a foreign power for the mutual protection of the property belonging to the citizens or subjects of each in the territory of the other. The treaty-making power of the Federal Government must, from necessity, be sufficiently ample so as to cover all of the usual subjects of treaties between different powers. If we were to deny to the treaty-making power of our government the exercise of jurisdiction over the property of deceased aliens, upon the ground of interference with the course of descents, or the laws of distribution of a State where property may exist; by parity of reasoning we should not make commercial treaties with foreign nations; because, it might be said, some of their provisions would injure the business of a portion of the citizens of one of the States of the Union.

"If the treaty-making power which resides in the Federal Government is not sufficient to permit it to arrange with a foreign nation the distribution

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treaty stipulation, he entertained doubts of the correctness of the decision.[130]

§ 241. **Rule recognized that treaty may regulate rights.**—The rule is definitely announced in California that the rights of aliens to possess and enjoy property in the United States may be regulated by treaty, and that all state legislation to the contrary must yield to a treaty as the supreme law. The right to regulate the tenure of real property within a state is primarily a state right, and a state may permit aliens to take hold and dispose of property, real and personal, to any extent that will not conflict with the provisions of a treaty. While the common-law rule is that an alien does not possess inheritable blood, the state may change this rule, and remove the disability, if there is no paramount law to prevent it. The fact that the treaty between the United States and Great Britain is silent upon the subject matter of the right of citizens of the latter country to inherit property within the United States is not, in effect, a denial of that right, nor can it in any manner affect the power of the state to confer the right.[131]

§ 242. **In Delaware.**—That a treaty is paramount to a statute was likewise declared in Delaware. The code of that state provides that it shall be no objection to the kindred, husband or

of an alien's property, then that power resides nowhere (since it is denied to the States), and we must confess our system of government so weak and faulty, as to be incapable of extending to its citizens in foreign lands that protection which is most common amongst a majority of modern civilized nations." People v. Gerke & Clark, 5 Cal. 383.

In Forbes v. Scannell, 13 Cal. 242, Mr. Justice Baldwin said (p. 282): "In People v. Gerke (5 Cal. 381), this court in giving effect to the treaty with the kingdom of Prussia, which had direct effect on property in this state in opposition to its laws of descent, went further than is necessary to go to uphold the treaty and laws in question." People v. Gerke, 5 Cal. 381, was cited in Blythe v. Hinckley, 127 Cal. 435, 59 Pac. 787; approved in Wunderle v. Wunderle, 144 Ill. 54, 33 N. E. 195, 19 L. R. A. 84, Opel v. Shoup, 100 Iowa, 407, 69 N. W. 560, 37 L. R. A. 583, and De Geofroy v. Riggs, 133 U. S. 267, 10 Sup. Ct. Rep. 295, 33 L. ed. 642; and also cited in Hauenstein v. Lynham, 100 U. S. 490, 25 L. ed. 628.

[130] Siemssen v. Bofer, 6 Cal. 252.

[131] Blythe v. Hinckley, 127 Cal. 431, 59 Pac. 787. State laws in conflict with a treaty are not so much void as they are suspended and controlled during the life of the treaty. Blythe v. Hinckley, supra.

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widow of any alien, of any citizen deceased, taking lands through the intestate laws, that they are aliens, provided that at the time of the intestate's death they reside within the United States. The code also declares that if any such kindred are aliens and do not reside within the limits of the United States at the time of the death of the intestate, they shall be passed as if they were dead. The treaty with Great Britain, ratified July 28, 1900,[132] provided that, if on the death of any person holding real property within the territory of one of the contracting parties, a citizen or subject, were it not for the disqualification by the laws of the country in which such real property is situated, would be entitled to take it, such citizen or subject shall be allowed three years in which to sell the same. The code is in violation of this treaty, which contemplates the removal of the disqualification of alienage, and places the next of kin, though aliens, on the same plane as if they were residents of the state.[133]

[132] 31 Stats. 1939.

[133] Dockstader v. Kershaw, 4 Penne. (Del.) 398, S. C., *sub nom.* Doe v. Roe, 55 Atl. 341. In that case the defendant contended that the language of the treaty was so obscure, ambiguous and contradictory, as to be incapable of any sensible interpretation, and referring to this, the court said: "It is almost inconceivable that the language of a paper of such grave importance as this treaty between two great nations should be clothed in language at once so loose and careless. It reflects but little credit upon the persons charged with the duty of forming this treaty, and suggests that some degree of competency should hereafter be required in such cases. Still, however, in applying the ordinary rules of interpretation to the plain purposes and scope of the treaty, it seems to us that section 1 of the treaty contemplates the elimination of the disqualification of alienage in the next of kin, so far as it relates to the subject matter of this suit, and puts the next of kin on the same footing as if they were all residents of this state at the time of the death of the intestate."

Article 1 of the treaty referred to reads: "Where, on the death of any person holding real property (or property not personal) within the territories of one of the contracting parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn."

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§ **243. In Illinois.**—Under the Revised Statutes of Illinois of 1845 aliens *residing in the state* were rendered capable of taking and transmitting real estate to the same extent as if the aliens were citizens of the United States, and it was provided that "it shall be no objection to any persons having an interest in such estate that they are not citizens of the United States, but all such persons shall have the same rights and remedies, and in all things be placed on the same footing, as natural-born citizens and actual residents of the United States." In 1851, the statute was amended, by the omission of the words "residing in this state," thus conferring upon all aliens, whether residing in Illinois or not, the right to take and transmit lands by deed, will or otherwise.[134] In 1887 an act was passed restricting the right of aliens to acquire and hold real and personal estate, and providing that a "nonresident alien, firm of aliens, or corporation organized under the laws of any foreign country shall not be capable of acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise, except that the heirs of aliens who have heretofore acquired lands in this state under the laws thereof, and the heirs of aliens who may acquire lands under the provisions of this act, may take such lands by devise or descent, and hold the same for the space of three years and no longer, if such alien at the time of acquiring such lands is of the age of twenty-one years, and if not twenty-one years of age, then for the term of five years from the time of acquiring such lands; and if, at the end of the time herein limited, such lands so acquired by such alien heirs have not become actual residents of this state, the same shall revert and escheat to the state of Illinois the same as the lands of other aliens under the provisions of this act."[135]

§ **244. Existence of treaty.**—An owner of land in Illinois died intestate, leaving among other heirs a brother and a sister, who were, and always had been, residents of the grand duchy of Baden, and subjects of the German Empire. They were not entitled to take any portion of the land by inheritance from their deceased brother if the act last mentioned was a valid law. The court stated that it is a general rule of the common law that

[134] 1 Starr & Curtis' Ann. Stats., c. 6, p. 264.

[135] Ill. Laws, p. 5; 3 Starr & Curtis' Ann. Stats., c. 6, p. 19.

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the title to real property must be acquired and transmitted according to the *lex rei sitae*, and that the right of aliens to hold land within the limits of the several states is a matter of state regulation, but "it is also true that the state law must give way if it conflicts with any existing treaty between the government of the United States and the Government of the country of which such foreigner is a subject or citizen."[136] While the court recognized this rule, it declared that "the treaty which will suspend or override the statute of a state must be a treaty between the United States and the government of the particular country of which the alien claiming to be relieved of the disability is a citizen or subject. A treaty with some other country, of which such alien is not a citizen or subject, cannot have the effect of removing the disability complained of." The court then went into the question whether a treaty actually existed, giving aliens the right to inherit. It appeared that several treaties referred to by the nonresident heirs contained a clause allowing nonresident heirs a reasonable time to sell real estate and withdraw the proceeds, but there was no treaty with Baden containing a similar clause. It was also contended that the treaty concluded on December 11, 1871, between the United States and the German Empire, into which Baden had been incorporated, contained a stipulation which should be construed so as to remove the disability imposed upon the nonresident heirs. The court held, however, that this last-named treaty could not be so construed, and on the ground, solely, that there was no treaty in existence between the United States and the grand duchy of Baden or the German Empire, decided that the disabilities imposed by the statute upon the nonresident aliens were not removed by any treaty stipulations.[137]

§ 245. Statute not unconstitutional as special law.—It may be observed, in passing, that the statute in question was held not to be in violation of any constitutional provision against local or special laws changing descent.[138] While in the case just cited

[136] Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84.

[137] Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84. The absorption of Bavaria into the German Empire did not abrogate the convention concluded between Bavaria and the United States on September 12, 1853. In re Thomas, 12 Blatchf. 370, Fed. Cas. No. 13,887.

[138] Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84.

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nonresident aliens claiming to take lands by descent in Illinois were held to be incapable of inheriting under the statute, because there was no treaty between their country and ours allowing them to acquire or hold lands, yet in another case the question was presented, where a treaty existed between the United States and the Hanseatic Republic of Bremen, of which the claimants were citizens. In this case the court held that the treaty superseded the statute, and that in accordance with its provisions the nonresident alien heirs were entitled to sell the lands in Illinois which they would inherit except for alienage, and to withdraw the proceeds at any time within three years from the death of the ancestor. The interest in the land that vested in the alien heirs by the grant of the right during a term of years to sell the land and withdraw the proceeds is a fee which may be terminated by a failure to exercise the power within the time specified, and such ownership of a terminable fee carries with it the right to a partition.[139]

§ 246. **Construction of words.**—In a case in this state the court was called upon to construe the word "biens" in a treaty written in French, which in the English version appeared as "effects." Article 6 of the treaty of April 3, 1783, between the United States and Sweden, as revised in article 17 of the treaty of July 4, 1827, provided that the subjects of the two contracting parties might "dispose of their goods and effects" by donation or other-

[139] Schultze v. Schultze, 144 Ill. 290, 36 Am. St. Rep. 432, 33 N. E. 201, 19 L. R. A. 20. Article 7 of the treaty which was concluded between the United States and the Hanseatic Republic of Bremen on December 20, 1827, is as follows: "The citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other by sale, donation, testament, or otherwise; and their representatives, being citizens of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein such goods are shall be subject to pay in like cases; and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance on account of their character of aliens, there shall be granted to them the term of three years to dispose of the same as they may think proper, and to withdraw the proceeds without molestation on the part of the government of the respective states."

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wise. In the French draft of the treaty the word "effects" was represented by the word "biens." This word in the civil law includes both immovables and movables. The court decided that this word, when construed with the words "heirs," "succession" and "inheritances," comprehended real as well as personal property, and, therefore, that an alien resident of Sweden might, notwithstanding the statute forbidding it, inherit land from a resident citizen of Illinois.[140]

[140] Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454. On the point of construction Mr. Justice Magruder, who delivered the opinion of the court, said: "The French words, appearing in the French copies of the treaty, which correspond to the words 'goods and effects,' are 'fonds et biens.'

"Appellees claim that the French word 'biens' means real as well as personal property. They introduced a witness upon the stand, who was a native of France, and educated in that country, to prove that such was the meaning of the word. This testimony, if it was not actually improper, was not material. United States v. Turner, 11 How. 663, 13 L. ed. 857. Bouvier, in his Law Dictionary, defines the French word 'biens' to mean: 'Property of every description, except estates of freehold and inheritance.' But this is evidently the strict meaning which it has as it is defined in the common-law writers, because immediately after this definition he adds these words: 'In the French law this term includes all kinds of property, real and personal. Biens are divided into biens muebles, movable property, and biens immuebles, immovable property.' It would thus appear that the word, as used in the original treaty, in the French language, has a meaning in the civil law, which includes both real and personal property. In a note to section 13 of Story on Conflict of Laws (8th ed.), it is said: 'The term "biens" in the sense of civilians and continental jurists, comprehends not merely goods and chattels, as in the common law, but real estate.' It is also said in a note to section 146 of the same work: 'Foreign jurists, commonly, in the term "biens," include all sorts of property, movable and immovable, in their discussions on this subject.' If, therefore, we look to the treaty as published in the French language, the term there used includes real estate as well as personal property.

"Consul for appellants contend that the French expression 'fonds et biens,' is correctly translated as 'goods and effects.' It is insisted that the English copy of the treaty (whether the treaty was originally negotiated in English as well as French, or whether an English translation was made of it after its original negotiation) is an official promulgation of the treaty in the English language, in view of the fact that it appears in publications and editions of the United States Statutes at Large, as authorized by Congress. Whether this view is correct or not, it may be admitted for the purposes of this case that the words 'goods and effects' are a correct translation of the French expression 'fonds et biens.' The question then arises as to the meaning of the word 'effects.' It cannot be doubted that

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§ 247. **Allowance of time to sell.**—The treaty with Württemberg of December, 1844, provided that when an alien shall inherit any real property he shall be allowed two years in which

in certain connections the word 'effects' sometimes refers to both real and personal property. It is true that as a general thing the word 'effects,' when used in connection with the word 'goods,' means personal property, and not real property. But this is not its correct meaning where a contrary intention appears from the terms of the instrument in which the word occurs. The word 'effects' is 'a very general term, used to denote whatever a man has that can effect, produce, or bring forth money by sale.' Am. & Eng. Ency. of Law, p. 174. Bouvier defines the word 'effects' as follows: 'Property or worldly substance. As thus used it denotes property in a more extensive sense than goods. 2 Bl. Comm. 284. Indeed, the word may be used to embrace every kind of property, real and personal, including things in action.' If the expression here, instead of being 'goods and effects' was 'goods and other effects,' we should be inclined to apply the rule of construction that general and specific words, which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general. Misch v. Russell, 136 Ill. 22, 26 N. E. 528, 12 L. R. A. 125; First Nat. Bank v. Adam, 138 Ill. 483, 28 N. E. 955. Thus, in the case of Bank v. Adam, supra, where the words used were 'all goods, chattels or other property,' it was held that the general words 'or other property' would be restricted to a meaning analogous to the meaning of the words 'goods and chattels,' and consequently would not embrace such property as fixtures or chattels real, partaking more of the nature of realty than personalty. So, here, if the expression were 'goods and other effects,' the words 'other effects' would be restricted to a meaning analogous to the meaning of the word 'goods,' and would not embrace real property. But, as the word 'other' is not used, there is no occasion for the application of the maxim, '*ejusdem generis.*' Even, however, if this maxim were applicable to the expression 'goods and effects,' standing alone, yet it is not applicable to the word 'effects' as here used, when considered in connection with other expressions appearing in article 6, as above quoted. In interpreting wills, it is well settled that the word 'effects' will be construed as including land where it can be collected from other parts of the will that such was the testator's intention. In other words, where the context of a will shows that it was the intention of the testator to dispose of his realty, the courts have held that the word 'effects' is sufficient to include the real estate. 6 Am. & Eng. Ency. of Law, pp. 176, 177; Smyth v. Smyth, 8 Ch. Div. 561; Page v. Foust, 89 N. C. 447. This being a proper rule of construction in the case of wills, it is equally proper as applied to public treaties.

"Where treaties concern the rights of individuals, it is frequently necessary for the courts to ascertain, by construction, the meaning intended to be conveyed by the terms used. Wil-

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to sell the same, "which time may be reasonably prolonged according to the circumstances." It was held that the courts should give effect to the words quoted, and should grant such time as would be reasonable. Hence, where alien heirs to real

son v. Wall, 6 Wall. 83, 18 L. ed. 727; United States v. Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425; Head Money Cases, 112 U. S. 580, 5 Sup. Ct. Rep. 247, 28 L. ed. 798. In thus giving construction to the language of treaties, the courts will adopt the same general rules which are applicable in the construction of statutes, contracts, and written instruments generally, in order to effect the purpose and intention of the makers. 26 Am. & Eng. Ency. of Law, p. 555. Moreover, it is another well-settled rule, laid down by the supreme court of the United States, that 'where a treaty admits of two constructions—one restricted as to the rights that may be claimed under it, and the other liberal—the latter is to be preferred.' Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Schultze v. Schultze, 144 Ill. 290, 36 Am. St. Rep. 432, 33 N. E. 201, 19 L. R. A. 20. When, therefore, we consider the meaning of the words 'goods and effects' in connection with the rest of article 6, as above quoted, we find such expressions therein as the following: 'Their heirs, in whatever place they shall reside, shall receive the succession even *ab intestato*,' etc., and 'these inheritances . . . . shall be exempted from all duty,' etc. The words 'heirs,' 'succession' and 'inheritances,' as here used, are very significant words in determining the meaning to be given to the word 'effects.' An heir is 'one who, upon the death of another, acquires or succeeds to his estate by right of blood and by operation of law; the person who takes an estate of lands or tenements by descent from another. . . . . In the Roman law and in the modern civil law, "haeres" or "heir," has a more extended significance than in the common law. The term is applied to all persons entitled to succeed to the estate of one deceased, whether by act of the party or by operation of law, and whether the property be real or personal in its nature.' 9 Am. & Eng. Ency. of Law, p. 357. At common law, chattels did not descend by inheritance, except in the instances in which they came under the description of 'heirlooms.' Bouvier defines the term 'inheritance' as follows: 'A perpetuity in lands to a man and his heirs; the right to succeed to the estate of a person who dies intestate. The term is applied to lands. The property which is inherited is called an "inheritance." The term "inheritance" includes not only lands and tenements which have been acquired by descent, but every fee simple or fee tail which a person has acquired by purchase may be said to be an inheritance, because the purchaser's heirs may inherit it.' He also says that in the civil law the term means 'the succession to all the rights of the deceased. It is of two kinds—that which arises by testament, when the testator gives his property to a particular person; and that which arises by operation of law, which is called succession *ab intestato*.' 'Inheritance' has also been defined to be 'an estate which descends or may descend to the heir upon the death of the ancestor. Estates of freehold are

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estate showed that they were unable to learn the names of the other heirs until proof of heirship was made in the probate court, about two years after the death of the intestate, and showed also that they had endeavored to obtain the assent of other heirs to agree to a sale of the property, but were unsuccessful, and that without such division they had been unable to sell, it was decided that a sufficient showing had been made to entitle the claimants to sell their interest, notwithstanding the lapse of the two years mentioned in the treaty since the death of the intestate.[141]

estates of inheritance, absolute or limited.' 2 Bl. Comm. 104, 120; 10 Am. & Eng. Ency. of Law, p. 777. The word 'inheritance' in its usual legal acceptation, applies to lands descended. In its popular acceptation it includes all the methods by which a child or relation takes property from another at his death, except by devise, and includes as well succession as descent. Horner v. Webster, 33 N. J. L. 413. 'Succession,' in the civil law, denotes the transmission of the rights and obligations of a deceased person to his heir or heirs. The word 'succession' is often used synonymously with the word 'descent.' Descent is hereditary succession to an estate in realty. 'Descent' usually applies to the devolution of real estate. The word 'inheritance' is also often used synonymously with 'descent' and refers to the devolution of real property. In its popular acceptation, however, the word 'inheritance' includes the devolution of both real and personal property, and is coextensive in meaning with the word 'succession.' 24 Am. & Eng. Ency. of Law, p. 345. Succession, in the civil law, includes immovable as well as movable estates. Thus, in article 6 of the treaty we find the words 'heirs' and 'inheritances' used. These words, in their strict common-law signification, refer only to the descent or devolution of real property; but in their broader signification, they include both real and personal property. We also find the word 'succession' used, which refers as well to the descent of real as of personal property. It is evident, therefore, that the terms of the treaty were intended to include real estate as well as personalty, and that the word 'effects' was intended to have the broader meaning which includes both land and personalty.'' Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454.

[141] Scharpff v. Schmidt, 172 Ill. 255, 50 N. E. 182. It was contended by counsel that it could not be presumed by the contracting parties to the treaty that the time for a transfer by an alien should be prolonged, except by an act of the same department of the government; that is to say, by the legislative, which established the limitation. The court disposed of the contention of counsel by saying, through Mr. Justice Carter, who delivered the opinion of the court: ''The meaning of counsel is not altogether clear, but it is presumed that their contention is that the two governments making the treaty, and which provided for a reasonable prolongation of the term (two years) according to circumstances, intended that

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§ 248. In Iowa.—In Iowa the statute prohibited nonresident aliens "from acquiring title to or taking or holding any lands or real estate in this state by descent, devise or purchase," with certain exceptions not necessary to be noticed. A nonresident alien who sought to acquire an interest as heir in real estate in Iowa was disqualified under the provisions of the statute mentioned. A treaty existed between the United States and Bavaria, of which country the alien was a citizen, and the question was,

the determination as to what circumstances would require a prolongation and would be a reasonable prolongation under such circumstances should rest in the legislature of the state where the lands should have their location, for it was not, of course, intended to be asserted that the legislative department 'established the limitations contained in the treaty.' Nor do we think it would be reasonable to claim that the treaty means that the question of such reasonable prolongation of time should in each particular case be made the subject of negotiation and treaty by the governments making the treaty in the first instance, nor do we understand counsel to so contend; but they do contend that, in the absence of any prolongation of time by the legislature, the limitation of two years fixed by the treaty must govern, and that when that time passed the appellants, being aliens, no longer had any interests in the property. Counsel do not point out any way in which the general assembly could have prolonged the limitation of two years upon the application of appellants. It may well be doubted whether the power to pass a special law on the subject exists under the constitution, and, if it does, it would be but a precarious right guaranteed by this treaty to make its enjoyment depend on the action of the legislature, which might not meet until the right was barred. If it be said that the legislature could have passed a general law on the subject, conforming to the treaty, we are unable to see what additional force would thereby have been given to the treaty. As it stands, the treaty is the law of the land, superior to any law which the legislature could pass, and seems to be as explicit as any general law could be reasonably framed. It would be but an idle ceremony for the legislature to re-enact the treaty, and we find nothing in the language of the treaty itself which would seem to make its application to any particular case depend on the action of the legislature. Like any other law, its construction and application to particular cases are questions for the courts. The clause in controversy, 'which term may be reasonably prolonged, according to circumstances,' means nothing more than that in cases where the circumstances are such as to make it reasonable that such aliens, in order to preserve their rights, should have further time, in addition to the term of two years, in which to sell their interest in the lands, such further time as may be reasonable under the circumstances shall be allowed. Any other construction would, for all practical purposes, render this provision of the treaty nugatory, while, like any other instrument, it should be con-

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What effect did the treaty have on the statute? It was contended that the states alone have the right to regulate, by legislation, descents and conveyances of real estate within their limits, and that the federal government had no power to interfere by a treaty with the right of the state to legislate as to the descent of property upon the death of its citizens. It was also urged that treaties made without authority are invalid, and that as the treaty was in conflict with the laws of Iowa, it had no force or effect. But Mr. Justice Given, delivering the opinion of the court, responded: "It may be conceded that the states alone have such power; that they alone may declare to what kindred the estate of persons dying intestate shall descend. It must also be conceded that the federal government alone has power to treat with other governments as to rights of the citizens of each within the territory of the other. This treaty does not attempt to regulate descent of real property in Iowa. It does not declare that, when a son or daughter dies without issue, the estate shall go to the parents. It is left to the state, and Iowa has so provided. This treaty simply declares that, if that parent is disqualified by alienage, as to the citizens of these two governments this disqualification is removed." [142]

strued to give it practical effect, rather than to make it ineffectual. The view we have taken is strengthened somewhat by the fifth article of the treaty, which provided that 'if any dispute should arise between different claimants to the same inheritance, they shall be decided, in the last resort, according to the laws and by the judges of the country where the property is situated.' Then, again, the rule is, that 'where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is preferred' (Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Schultze v. Schultze, 144 Ill. 290, 36 Am. St. Rep. 432, 33 N. E. 201, 19 L. R. A. 20), and construction of treaties is the peculiar province of the judiciary when a case arises between individuals (Wilson v. Wall, 6 Wall. 83, 18 L. ed. 727)."

[142] Opel v. Shoup, 100 Iowa, 407, 69 N. W. 560, 37 L. R. A. 583. The treaty referred to was concluded and adopted between the United States and Bavaria on January 21, 1845, and the clauses bearing upon the rights of alien to inherit land were the following:

"Article 1. Every kind of droit d'aubaine, droit de retraite, and droit de detraction or tax on emigration, is hereby, and shall remain, abolished between the two contracting parties, their states, citizens, and subjects, respectively.

"Article 2. Where, on the death of any person holding real property within the territories of one party,

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§ 249. Goods not including lands.—In a later case, the court construed the treaty between Sweden and the United States concluded in 1783. Article 6 of this treaty, under which the claim of the alien was made, declared: "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation, or otherwise in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession even *ab intestato,* either in person or by their attorney, without having occasion to take out letters of naturalization." The court said, conceding that this treaty was in force—which matter the court did not determine—it did not, in its opinion, apply to lands. The court quoted the definition of "goods" from Webster and decided that "goods and effects had never been held to include real estate."[143]

§ 250. Treaty contemplating one step of transmission.—In another case in Iowa, the rule was recognized that a treaty providing that aliens may inherit land will control, although it is in conflict with the laws of the state. It was contended in this case that the treaty contemplated but one step of transmission, and that the treaty was intended to apply only to persons resid-

such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof, without molestation, and exempt from all duties of detraction.

"Article 3. The citizens or subjects of each of the contracting parties shall have power to dispose of their (real and) personal property within the states of the other, by their heirs, legatees, and donees, being testament, donation, or otherwise; and citizens or subjects of the other contracting party, shall succeed to their said (real and) personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

[143] Meier v. Lee, 106 Iowa, 303, 76 N. W. 712. The language of the treaty construed by the court was as follows: "The subjects of the contracting parties may freely dispose of their goods and effects, either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession even *ab intestato,* either in person or by their attorney without having occasion to take out letters of naturalization."

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ing in this country so far as land in this country is concerned. The court held, however, that property devised to a citizen of the foreign country with which the treaty was made descends on the death of such citizen to his heirs, who were also subjects of such foreign country.[144]

The citizens of Waldeck became the subjects of Prussia under the terms of the treaty between the King of Prussia and the Prince of Waldeck, and therefore are affected by the treaty between the United States and Prussia providing for the rights of inheritance of the two countries.[145]

[144] Doehrel v. Hillmer, 102 Iowa, 169, 71 N. W. 204. Under the laws of Iowa nonresident aliens cannot acquire land. Furenes v. Mickelson, 86 Iowa, 508, 53 N. W. 416; Burrow v. Burrow, 98 Iowa, 400, 67 N. W. 287. As to the construction of the treaty, Mr. Justice Ladd, delivering the opinion of the court, said: "But the appellants contend that the treaty is intended to apply only to persons residing in this country, so far as land in this country is concerned; further, that the treaty contemplates but one step of transmission. It is held in the case of Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628, that 'where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.' The wording of the article quoted from the treaty seems to preclude the construction contended for. The evident purpose was to so protect the citizens and subjects of both countries in their property interests that alienage would not affect the right of inheritance. The citizenship or residence of the person upon the death of whom real estate descends is not mentioned. The property, and not from whence it comes, is the important consideration. 'And where upon the death of any person holding real estate within the territories of one party' can only be given one intelligent construction—that of the plain import of the language employed. By the terms of the treaty considered in Schultze v. Schultze, supra, relied upon by appellants, inheritance is expressly limited to the heirs and devisees of one country from subjects or citizens of the other. In Opel v. Shoup, supra, this court considered a treaty between the United States and the King of Bavaria, a part of the second article of which is identical with that involved in this case; and it was there held that real property inherited by a subject of the King of Bavaria from her daughter, a citizen of this country, descended to her (the mother's) heirs, who were also subjects of the king. Clearly, under the terms of the treaty with the King of Prussia, alienage does not affect the right of inheritance, when the heir or devisee is a citizen or subject of the country of the decedent, and this is not limited to one step in transmission." Doehrel v. Hillmer et al., 102 Iowa, 169, 71 N. W. 205.

[145] Wilcke v. Wilcke, 102 Iowa, 173, 71 N. W. 201. On this point Mr. Justice Granger, delivering the opinion of the court, said: "A more difficult question is whether the treaty pleaded as existing between the

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§ 251. In Kentucky.—In Kentucky the court announced that it was a well-known principle of the common law and also of the law of that state that lands do not pass from or to an alien by descent, but that upon the death of the person last seised without heirs, who are capable of inheriting, the title vests in the commonwealth without office found. But the court said, in a case

United States and Prussia takes the claimants, against the widow, out of the provisions of our law prohibiting nonresident aliens from acquiring property in this state by descent. No question is made as to the prohibition in this case, unless such claimants are relieved from the operation of the law by the terms of the treaty pleaded. Nor is there any question but that, if the plaintiff and the other appellees were subjects of the king of Prussia at the decease of Adam Wilcke, the treaty operates to relieve them from the prohibitions of the law. We are to determine, as a question of fact, whether the province of Waldeck is so far a part of the kingdom of Prussia that citizens of Waldeck are subjects of the King of Prussia, within the meaning of the treaty between the United States and Prussia. As the record is presented, we are to determine this question in the light of history, as it may be aided by particular evidence introduced. The basis for the claim that its citizens are such subjects is a treaty between Prussia and Waldeck relative to the transfer of the administration of Waldeck to Prussia. The articles of treaty appear in the record, and they appear as made by 'his majesty, the King of Prussia, and his serene highness, the Prince of Waldeck'; and it is expressed that the parties are 'animated by the wish of facilitating the entry of the principalities of Waldeck and Pyrmont into the North German Confederation.' The articles are some 12 in number, from which it appears that Prussia undertakes the international administration of the principality of Waldeck, exclusively, except in certain particulars, which seem to be mainly of ecclesiastical and charitable importance. While the administration is to be in the name of the prince, a governor is appointed by the king, and placed at the head of the administration of the principality, and undertakes 'the constitutional responsibility of the government of the country.' Prussia is empowered to organize the judicial and administrative authorities differently, according to her judgment. Prussia is to receive the whole of the services of the principality, and defray all expenses, except some pertaining to ecclesiastical authority. All the state servants are appointed by Prussia, are Prussian subjects, and take the oath of allegiance to the King. The representations of the country abroad is retained by the prince, but it is exercised under the responsibility of the governor, who is appointed by the King. It is to be said that the authority reserved to the prince is of slight importance, and practically divorced from the temporal concerns of government. The articles speak of Waldeck both as a principality and a state. The testimony as to the application of the treaty to government affairs shows, as to its temporal concerns generally, that the province is as much a part of the Prussian king-

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in which the right of aliens to inherit was involved, that the ninth article of the treaty of 1794 between the United States and Great Britain provided that British subjects holding lands in the United States should continue to hold them, and that as to such lands and the legal remedies incident thereto neither they nor their heirs should be regarded as aliens. On the effect of the treaty on the right of the alien to hold, the court said: "It has been decided that the treaty protects the title, whatever it is, and gives to it the same validity as if in the hands of a citizen." [146]

§ 252. **Lapse of time precluding claim.**—In a case in this state it was admitted that the judgment of the lower court declaring a widow entitled to a tract of land could not be disturbed, unless certain other kindred could claim under the treaty stipulation between the United States and the Swiss Federation. The court conceded that the treaty was paramount to the state law, but held that the claimants were precluded from the interest claimed by them by the lapse of time. Under the law of Kentucky, all rights to alien heirs were refused at any and all times; "the treaty, however, invests them with an interest provided it is asserted within three years after the right accrues; or rather, it forbids any law limiting their right of recovery to less than three years, the effect of which is to permit any restriction by state legislation against such recovery, which will not interfere with the right for that period. The state law was, therefore, so affected by the treaty as to become inoperative for a period of three years—but no further—it being a well-settled rule that

dom as any province could be with any slight reservation of governmental authority. It has a slight representation in the federal council and imperial diet, or at least it did have. It is historically said that its military affairs are all in the hands of the Prussian government, and education, the administration of justice, and similar matters are all conducted on the Prussian model. If a subject is one who is governed by the laws of a sovereign or country, and owes allegiance thereto, it is difficult to escape the conclusion that the citizens of Waldeck are subjects of the King of Prussia. Prussian authority is almost, if not quite, absolute, as to its military, judicial, and administrative affairs. Little, if anything of importance is left, except its religious concerns. These, we think, are the controlling facts in the case; and our conclusion is that, because of the treaty between this and the Prussian government, the appellees inherit from Adam Wilcke." Wilcke v. Wilcke, 102 Iowa, 173, 71 N. W. 203.

[146] Trimbles v. Harrison, 1 B. Mon. (40 Ky.) 140.

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when a state law is deemed unconstitutional, because opposed to the Constitution, laws and treaties of the federal government, it is only void so far as it contravenes the Constitution, laws or treaties.''[147]

§ 253. **In Maryland.**—In Maryland the court held that on the 19th of November, 1794, when the treaty between Great Britain and the United States was made, no British subject could hold land in that state, and that by virtue of certain acts of confiscation, the state was in possession of all British property within the limits of the state, and decided that the treaty had no application. A writ of error was sued out to the supreme court of the United States, on the ground that the case was one arising under a treaty, but the latter court did not consider it such a case and dismissed the writ.[148]

§ 254. **In Massachusetts.**—In Massachusetts a suit was brought upon an information in the nature of an inquest of office, and it was alleged in the information that an alien had purchased the tenements in fee; that in consequence of his alienage the commonwealth was entitled to them, but the defendant unlawfully held them. The defense was placed on two grounds: First, that an inquest of office could not be had to entitle the commonwealth to lands purchased by an alien, after he had conveyed his estate in them; and secondly, that by the treaty of 1794 between Great Britain and the United States, the alien was protected in his purchase, so that a conveyance by him in fee to a citizen of the United States would pass the estate to such citizen. The court

[147] Yeaker's Heirs v. Yeaker's Heirs, 4 Met. (Ky.) 33, 81 Am. Dec. 530.

[148] Owings v. Norwood, 2 Har. & J. (Md.) 96. In the United States supreme court Mr. Chief Justice Marshall said: ''The reason for inserting that clause in the constitution was that all persons who have real claims under a treaty should have their causes decided by the national tribunals. It was to avoid the apprehension as well as the danger of state prejudices. The words of the constitution are 'cases arising under treaties.' Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states, and whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by the treaty.'' Owings v. Norwood, 5 Cranch, 344, 3 L. ed. 120.

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did not give an opinion on the first ground, but held the second ground of defense sufficient, as the alien's title was protected by the treaty.[149] This treaty applies to vested remainders as well as to estates in possession. "The word 'lands' in the treaty must be understood to mean any estate which one may hold in land, and cannot be confined to the actual possession and occupation of the soil."[150]

§ 255. **In Michigan.**—In Michigan the court held that the provisions of the treaty of 1794 between Great Britain and the United States applied only to the protection of valid titles. They did not apply to mere possessory rights without any title in fact, which by later legislation by Congress were, in cases of continuous occupancy and improvement, enlarged into freeholds.[151] The court said that the policy of the government had uniformly been to encourage resident aliens to become citizens, and, hence, it would violate that policy to concede, by construction, to those who continued to be aliens by choice, rights not conferred expressly by treaty or by statute.[152]

Where a treaty recognizes the reservation of certain lands to have been in a certain tribe of Indians, the courts are bound so to regard it. "When a treaty," said Mr. Justice Campbell, "has been made by the proper federal authority and ratified, it becomes the law of the land, and the courts have no power to question, or in any manner look into, the power or rights of the nation or tribe with whom it is made. The action of the treaty-making power is conclusive upon such inquiry."[153]

§ 256. **In New York.**—In New York it was held in a case decided in 1802 that the American Revolution worked no forfeiture of previously vested rights in lands. The court considered the rights of certain aliens to acquire land in that state, and after deciding in their favor, stated that if any doubt existed, it would be removed by the treaty, and after quoting the ninth article of the treaty of 1794 between Great Britain and the United States,

[149] Commonwealth v. Sheafe, 6 Mass. 441.

[150] Fox v. Southack, 12 Mass. 143.

[151] Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430.

[152] Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430.

[153] Maiden v. Ingersoll, 6 Mich. 372, 376.

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said: "This provision thus removes all objections to the title of those lessors, or to their remedy founded on the joint demise of them, and their husbands, so far as their *alienism* is the cause of the objection." [154]

A British subject died in 1793 owning real estate in New York without issue, leaving a brother and three sisters living in Ireland. In 1804 the legislature passed an act vesting the real estate in one of the sisters, who had married an alien, in like manner as if she had been a citizen at the time of her brother's death. In an action of ejectment it was held that the decedent, having emigrated to this country after the Declaration of Independence, was to be considered as an alien, and that the land held by him was, by the provisions of the treaty of 1794, vested in him and his heirs notwithstanding their alienage. The act of the legislature giving the whole of his estate to one of his heirs in exclusion of the rest was in violation of the treaty and void.[155]

A case arose in that state where the treaty of 1794 was held to have no application, because the title to the lands involved was acquired after the treaty, and did not exist at the time the treaty was concluded, the treaty protecting only existing titles.[156] But if at the date of that treaty a British subject was the owner of land, by virtue of a conveyance executed in 1774, and he died an alien in 1802, he and his heirs, it was held, were entitled to protection under that treaty, although they had no possession under their title. The son of the alien owner, who was also an alien, could take the lands by descent from his father.[157]

Under the treaty of 1794 a British subject holding lands in the United States was authorized to convey or devise the property to aliens as well as to citizens.[158] The treaty of 1794 rendered the title of every alien British subject to lands in every part of the United States then held by him not only valid, but freely alienable, as though he had been a native-born or naturalized citizen.[159]

§ 257. Limitation on time to sell.—The treaty of 1845 between the United States and the grand duchy of Hesse provided that

[154] Jackson v. Lunn, 3 Johns. Cas. 109, 119, per Radcliff, J.

[155] Jackson v. Wright, 4 Johns. 75.

[156] Jackson v. Decker, 11 Johns. 418.

[157] Munro v. Merchant, 26 Barb. (N. Y.) 384.

[158] Watson v. Donnelly, 28 Barb. (N. Y.) 653.

[159] People v. Snyder, 51 Barb. (N. Y.) 589.

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in cases where, on the death of any person holding real property within the territories of one party, such real property would, according to the law of the land, descend on the subject or citizen of the other were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years in which to sell the same, which term may be reasonably prolonged according to circumstances. The court, construing this provision, held that title to real property descended upon the death of the owner to such heirs of the decedent as were residents and capable of taking, subject to be devested by a sale within two years by the alien heirs. If the alien heirs, however, do not exercise the power of sale given by the treaty, within the time specified, and no prolongation of the time is obtained, the title vests unqualifiedly in the citizen heirs. The legislature of the state, where Congress has failed to act, has power to prolong the term in which the power of sale may be exercised. It has the power to determine what would be a reasonable prolongation of that term, and if it passes an act giving an indefinite unlimited time in which the alien heirs can convey the land, it does no harm or injustice to the resident heirs. Such an act is valid, and a conveyance made by the alien heirs after the expiration of the period of two years mentioned in the treaty is valid.[160] Such a treaty modified the laws of descent prevailing in the state only to the extent necessary to give the provisions of the treaty scope. It left the state laws to operate as a devolution of the estate of the decedent, subject to the power of sale given to his alien heirs. The resident heirs, by such a treaty, took the title subject to the power of sale, and were authorized to hold the land until a conveyance was made by the alien heirs under the power of sale.[161] The law of New York providing that the right of alien adult males to inherit land shall be dependent on the filing of a deposition of their intention to become citizens before the conclusion of proceedings by the state to defeat their title is superseded, so far as citizens of Prussia are concerned, by the treaty concluded in 1828, declaring that subjects of that country who are incapable by reason of alienage from inheriting land in the United States shall be allowed a reasonable time in which to sell the same, and to

[160] Bollerman v. Blake, 94 N. Y. 624, 24 Hun (N. Y.), 187.

[161] Bollerman v. Blake, 94 N. Y. 624, 24 Hun (N. Y.), 187.

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withdraw the proceeds.[162] It was in the case just cited considered that a sale of the land of a decedent within two years and four months after his death was a sale within a reasonable time as contemplated by this provision of the treaty.[163]

The provision in the treaty with Württemberg that an alien shall be allowed two years in which to sell real property, which term may be reasonably prolonged, is, it is held, in effect a statute of limitation, and when there has been no prolongation the statute must apply.[164]

§ 258. Existence of title at time of treaty.—As the treaties of 1783 and 1794 between the United States and Great Britain provide only for titles then existing, no claim to lands can be established under either treaty where the claimant cannot show a title in himself or his ancestor at the time of the execution of the treaty. A native of New York, whom we shall call A, resided and owned land in that state after the Declaration of Independence, but in 1783 left for Nova Scotia with his family, excepting his eldest son. He died on the passage but his family continued on to Nova Scotia, where they settled and remained ever afterward in the British provinces. His eldest son remained in New York in the occupation of the land until 1838, in which year he died, leaving surviving him several children. It was decided that all of A's children were aliens, incapable of taking by descent, and that as against them the land should be awarded to the children of the eldest son.[165]

The escheat of lands held by British subjects in New York was barred by the sixth article of the treaty of 1783, and they were enabled to transmit them by descent, but such descent must be to a citizen. If a British subject died previous to the treaty of 1794, leaving no citizen heirs, the provisions of the treaty, it was decided, did not pass the land to alien heirs, but it escheated.[166] So, under the treaty with Prussia, an alien may take and hold land under a devise from a native-born citizen.[167]

[162] In re Beck, 11 N. Y. Supp. 199, 31 N. Y. St. 965, 2 Connolly Surr. (N. Y.) 355.

[163] In re Beck, 11 N. Y. Supp. 199, 31 N. Y. St. 965, 2 Connolly Surr. (N. Y.) 355.

[164] Wieland v. Renner, 65 How. Pr. 245.

[165] Orser v. Hoag, 3 Hill (N. Y.), 79.

[166] Brown v. Sprague, 5 Denio (N. Y.), 545.

[167] Stamm v. Bostwick, 40 Hun, 35.

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§ 259. **Same rights as resident heir.**—The treaty between the United States and Württemberg providing that an alien heir shall be allowed two years in which to sell property devolving on him is intended to confer on the alien heir for that period precisely the rights that he would enjoy if he were a resident heir. Pending that time, he may possess the property, improve it and exercise all dominion over it for the purpose of rendering it more productive and valuable, and may enjoy its rents and profits. The treaty, as the supreme law of the land, is paramount to all state laws.[168]

§ 260. **In North Carolina.**—In North Carolina, article 6 of the treaty made in 1782 between the United States and the States General of the United Netherlands was before the court for construction, and one of the questions to be determined was as to the meaning to be given to the word "effects"—whether it included things immovable as well as movable. The court declared that unless the word embraced things immovable as well as movable, no right was granted by the treaty, because under the law relative to alienage there was no objection to the acquisition of title to movable or personal property, either by purchase or succession by law.[169]

[168] Kull v. Kull, 37 Hun (N. Y.), 476. This treaty of 1844 between the United States and the kingdom of Württemberg relative to the right of aliens to succeed by descent was abrogated by the treaty of December 11, 1871, between the United States and the Emperor of Germany, as the latter, under the constitution of the Empire of Germany, in which the kingdom of Württemberg had become incorporated, represents the empire among nations and makes alliances with them. In re Strobel's Estate, 39 N. Y. Supp. 69, 5 App. Div. 621.

[169] University v. Miller, 14 N. C. 188. The language of the court was as follows: "The next question is the effect of that treaty on the case. By the sixth article it is provided that the subjects of either party may dispose of their effects by testament, donation, or otherwise; and their heirs, subjects of one of the parties, shall receive such successions *ab intestato*, even though they have not received letters of naturalization. And, if the heirs to whom such succession falls shall be minors, their guardian or curator may govern, direct, and alienate the effects fallen to such minors by inheritance. If this case rested on the meaning to be given to the word 'effects' even without a context, I should think, being found where it is, in a treaty between powers having no common technical terms—in fact not a common language—that it included things immovable as well as movable. In the first place, the instrument is to receive an extended and liberal construction; not like the contract of individuals, where nothing

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Although many revolutions and changes in the government had occurred, the court held in that case that the courts cannot notice judicially what treaties with foreign governments are in force, as that question must be determined by the Executive.[170]

§ 261. Confiscation acts annulled.—The treaty of peace with Great Britain of 1783 annulled the confiscation acts of North Carolina, and debts due to British subjects paid into the public treasury in conformity with such confiscation acts may be re-

is presumed to be granted but that falls plainly within the words of the grant. But in this case, unless the meaning of the word be extended to things immovable, nothing at all is granted by the word 'effects'; for by our law alienage is no objection to the acquisition of movables in any way, either by purchase or succession *ab intestato*. And so I presume it is in the States General. If not, to obtain it by pretending to grant something in lieu of it, when in fact nothing was granted, is a trick which I would not, even in argument, impute to our negotiator. But taken with the context, I think there cannot be a doubt. The words 'succession *ab intestato*' are a well-known term of the civil law—a law on which the laws of continental Europe may be said to be based. By that law, it includes succession to immovable as well as movable estates. And to use terms which by this almost universal law would give to our citizens the right to succeed to immovable estates, and to deny it to them by any restricted sense to which we might confine the terms, is not presumed to have been the intent of either party. I say 'to give to our citizens' because, if the civil law prevails in the Netherlands—and I presume it does—it would do so. But why negotiate in the terms of the laws of the Netherlands, and not in the terms of our laws? The answer is: Our laws are peculiar to use and the English—the civil law, common to all continental Europe. But there are terms in the context which even in our law would give to this word 'effects' an immovable character. In the civil law, he who succeeds to the estate of a dead man, either movable or immovable, is called 'heir.' By our law, the term is confined to him who succeeds to his immovable, or rather real, estate. By the civil law, 'inheritances' embrace movable as well as immovable estates. By our law, the term is confined to immovable estates; at least, it does not embrace what we call 'chattels.' But in the treaty both the word 'heirs' and the word 'inheritances' are used. How shall they be understood—according to our laws or theirs? If, by our laws, goods only are to be included, we shall have in our legal phraseology—new, to be sure—'heirs claiming money and other personal goods, descending from their ancestor as their inheritance.' It is very plain, I think, that it was intended to embrace all kinds of property by the treaty; and therefore, the lands in question are embraced by it. Effects descending by inheritance must include land."

[170] University v. Miller, 14 N. C. 188.

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covered by the creditor from the debtor.[171] And where a person named in such confiscation act has given a bond to convey his land, he is entitled under that treaty, as a British subject, to recover the balance due on the bond.[172] But if the confiscation had been perfected by inquest and lapse of time, the treaty has no operation.[173]

§ 262. In Pennsylvania.—In Pennsylvania an act of proclamation was issued during the war of the Revolution, and an individual who did not appear within the time prescribed was attainted of treason for adhering to the King of Great Britain; and as a consequence his estate was confiscated to the use of the commonwealth. It had, however, not been taken into possession, and after peace had been declared he returned to Pennsylvania and applied to the executive council for a restoration of his estate, representing that he was a minor at the time of his attainder, and was forcibly prevented by his guardian from enlisting in the American army. It was finally suggested that the attorney general should file a suggestion in the supreme court of the attainder of the defendant, and this was done. But the chief justice delivered the opinion of the court to the effect that any proceedings against the defendant would contravene the treaty of peace and amity between the United States and Great Britain, for

[171] Hamilton v. Eaton, 2 Mart. (1 N. C.) 1, 1 Hughes, 249, Fed Cas. No. 5980. Said Chief Justice Ellsworth: "Here it is contended by the defendant's counsel that the confiscation act has not been repealed by the state; that the treaty could not repeal or annul it; and therefore that it remains in force, and secures the defendant. And further, that a repeal of it would not take from him a right vested to stand discharged. As to the opinion, that a treaty does not annul a statute, so far as there is an interference, it is unsound. A statute is a declaration of the public will, and of high authority; but it is controllable by the public will subsequently declared. Hence the maxim, that when two statutes are opposed to each other, the latter abrogates the former. Nor is it material, as to the effect of the public will, what organ it is declared by, provided it be an organ constitutionally authorized to make the declaration. A treaty when it is in fact made, is, with regard to each nation that is a party to it, a national act, an expression of the national will, as much so as a statute can be. And it does, therefore, of necessity, annul any prior statute, so far as there is an interference. The supposition that the public can have two wills at the same time, repugnant to each other, one expressed by a statute and another by a treaty, is absurd."

[172] Ray v. McCulloch, 1 N. C. (N. C. Conf.) 492.

[173] Commonwealth v. Bristow, 6 Call (Va.), 60.

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which reason it refused to sustain the suggestion filed by the attorney general.[174] Referring again to the attainder laws of that state it was held in the federal courts that the stipulations in the treaty are paramount to the provisions of a particular state.[175]

§ 263. In South Carolina.—In South Carolina the effect of treaties upon alienage has been considered, and the court decided that the treaty of 1794 enabled an alien mother of an American daughter to inherit her lands in that state.[176] But it was held that this treaty did not enable aliens to take by descent the land of British subjects situated in this country.[177] By the provisions of the treaty with Prussia, citizens and subjects of the two countries are authorized to sell real estate which descends to them in the country of the other power, and these provisions are applied to Poles, who are subjects of Prussia, and consequently they are allowed to take by virtue of the residuary clauses in a will.[178]

§ 264. In Tennessee.—In Tennessee the court stated that an alien had no inheritable blood. Provisions as to the rights of alien heirs were made by the code of that state, but the cause before the court, it was stated, must be determined at last upon the international agreement on the subject existing with France, and in the language of Mr. Justice Sneed: "If the law contravenes the treaty, the latter must prevail. The treaty is the supreme law on this subject. Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the state; and whoever may have this right, it is to be protected."[179]

Construing the treaty of 1783, the court held that natives of Scotland who became residents and had their domicile in the United States before the close of the revolutionary war were *prima facie* not aliens, and that the burden of proving their ad-

[174] Respublica v. Gordon, 1 Dall. (Pa.) 233, 1 L. ed. 115.

[175] Gordon v. Kerr, 1 Wash. C. C. 322, 10 Fed. Cas. No. 5611.

[176] Megrath v. Robertson, 1 Desaus. Eq. 449.

[177] Ex parte Dupont, Harp. Eq. 5. See for other cases in South Carolina, Duncan v. Beard, 2 Nott & McC. 400; Love v. Hadden, 3 Brev. 1.

[178] Hart v. Hart, 2 Desaus. Eq. 57.

[179] Baker v. Shy, 9 Heisk. (Tenn.) 85.

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herence to the British crown rested upon those who imputed alienage.[180]

Where, in an action of ejectment, the plaintiff claimed under a grant from North Carolina made in 1800, founded on an entry made in 1783, and the defendant based his claim on a reservation in favor of a native Indian by a treaty made with the Cherokee Indians in 1879, it was decided that the defendant had the better title.[181] It was likewise held that the reservations of land to the head of every Indian family made by the treaties with the Cherokees of 1817 and 1819 are valid and binding on the state of Tennessee and on all persons claiming through the state.[182]

§ 265. **In Texas.**—In Texas it was claimed that the statute providing for an investigation by commissioners of land titles was in violation of the treaty of Guadalupe Hidalgo. The statute provided that "No sale by any claimant of land under the provisions of this act shall take place until after a title to the same shall have been confirmed to the original claimant or claimants, but all such sales of lands or claims to lands shall be void; and no claims to lands in the hands of a third person shall be recognized by the board of commissioners unless the sale or transfer of the same was made prior to the passage of the act." It was claimed that this act was in violation of the treaty, and while the court said it would be a sufficient answer to the objection to say that it did not appear that the claimant was a citizen of Mexico at the date of the treaty, yet even if he were, the act was not violative of the treaty because it secured Mexicans in their rights of property and gave them, in that respect, the same protection extended to citizens of the United States.[183]

§ 266. **In Virginia.**—In Virginia, under the treaty of 1794 between the United States and Great Britain, it was held that an alien had the power to convey by deed or will any real estate held by him at the date of the treaty to any person capable

[180] Moore v. Wilson, 10 Yerg. (Tenn.) 406.

[181] Cornet v. Winston, 2 Yerg. (Tenn.) 144.

[182] Blair v. Pathkiller, 2 Yerg. (Tenn.) 407.

[183] Baldwin v. Goldfrink, 88 Tex. 249, 31 S. W. 1064.

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of taking and holding title to real property.[184] But where the land has been actually confiscated by office found, and the confiscation perfected, the treaty had no operation.[185]

As a citizen of Great Britain was by the treaty entitled to hold land, and no proceedings had been instituted during the war of 1812 to escheat it, his rights were not devested by the war, but upon his death the land descended to his heirs.[186]

[184] Foxwell v. Craddock, 1 Pat. & H. (Va.) 250.

[185] Commonwealth v. Bristow, 6 Call (Va.), 60.

[186] Fiott v. Commonwealth, 12 Gratt. (Va.) 564.

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CHAPTER X.

TREATIES OF CESSION.

§ 267. Power to acquire territory by treaty.
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§ 296. Foreign corporations not subjects.
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§ 267. Power to acquire territory by treaty.—The Constitution does not contain an express declaration that the United States has power to acquire foreign territory by treaty, but as Chief Justice Marshall said, the Constitution does confer "absolutely on the government of the Union the power of making war and of making treaties; consequently, that government pos-

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sesses the power of acquiring territory, either by conquest or by treaty."[1]

With respect to the relations of the inhabitants to each other, Chief Justice Marshall said: "The usage of the world is, if a nation be not entirely subdued, to consider the holding conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the state."[2]

§ 268. Territory may be acquired by war power or treaty-making power.—As said by Mr. Justice Swayne: "What is clearly implied in a written instrument is as effectual as what is ex-

[1] American Ins. Co. v. 356 Bales of Cotton, 1 Pet. (U. S.) 512, 7 L. ed. 243.

[2] American Ins. Co. v. 356 Bales of Cotton, 1 Pet. (U. S.) 512, 7 L. ed. 255: "On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: 'The inhabitants of the territories which his Catholic majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.'

"This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government with Florida till Florida shall become a State. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'

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pressed. The war power and the treaty-making power, each carries with it authority to acquire territory. Louisiana, Florida and Alaska were acquired under the latter, and California under both."[3] The power of the United States to acquire territory, either by purchase or by treaty, is undisputed, and when the territory of California passed to the federal government, every acre of land not the property of Mexican citizens passed to it. As sovereignty can never be in abeyance, it follows, upon the ground of necessity, that until the organization of some local government, the United States succeeded to and represented the government of Mexico, so far as under the Constitution such powers could be exercised.[4] After the acquisition of foreign territory by treaty, Congress has the power to pass laws for the purpose of protecting the private rights of the inhabitants of the ceded territory that have been guaranteed to them by the treaty. State authority cannot interfere with such laws.[5]

§ 269. Sovereignty passes and not property.—When territory is acquired by a treaty of cession, the sovereignty over the territory ceded passes to the United States, but not the property of the inhabitants. It was stipulated in the treaty by which Louisiana was acquired that the inhabitants of the ceded territory should be protected in the free enjoyment of their property.[6] But Chief Justice Marshall, in a case in which this treaty came before the court, said that as a just nation the United States regarded this stipulation as a declaration of a principle "which would have been held equally sacred though it had not been inserted in the contract."[7]

Mr. Justice Baldwin, delivering the opinion of the court, said that it was definitely settled: "That by the law of nations, the

"Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, 'the possession of it is unquestioned.'" United States v. 356 Bales of Cotton, 1 Pet. 512, 7 L. ed. 255.

[3] Stewart v. Kahn, 11 Wall. (U. S.) 507, 20 L. ed. 179.

[4] People v. Folsom, 5 Cal. 375.

[5] Gardiner v. Miller, 47 Cal. 570.

[6] 8 Stats. at Large, 200.

[7] Soulard v. United States, 4 Pet. (U. S.) 511, 7 L. ed. 938.

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inhabitants, citizens, or subjects of a conquered or ceded country, territory or province retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed. That a treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee. That by the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully obtained such a right by a perfect or inchoate title, that this court could consider it as property under the second article, or which had, according to the stipulations of the rights, been granted by the lawful authorities of the king; which words 'grants or concessions' were to be construed in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect."[8]

§ 270. **Wishes of population not to be consulted.**—There is no principle of international law that the wishes of the people should be consulted upon the cession of the territory inhabited by them, and until title by conquest has disappeared, no such principle can be adopted.[9] In 1897, when it was proposed to annex the Hawaiian Islands to the United States, objections to this course were made by Mr. Toru Hoshi, the Japanese Minister, under instructions from Count Okuma, and in the opening of the note on the subject the statement was made: "It is understood that only a small fraction of their number favor annexation." Mr. Sherman, Secretary of State, said that he could not allow this declaration to pass over in silence, and stated: "It cannot be that one so well informed in the history of international relations as Count Okuma could have wished to suggest thereby the propriety of appealing from the action of the Government to 'the population.' In international comity and practice the will of a nation is ascertained through the established and recognized government, and it is only through it that the nation can speak. This is shown

[8] Mitchel v. United States, 9 Pet. 711, 9 L. ed. 283.

[9] Hale's International Law, 4th ed., 49.

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in the relations of the United States with Japan. The first intercourse of this Government with the Empire was had, with an authority which held a divided, if not disputed, sovereignty. Later, when all power and legislation was centered in the Emperor, this Government recognized him as the sole exponent of the public will. When parliamentary government was established the changed relation was accepted by the United States. No inquiry was thought proper to ascertain whether these various changes received the sanction of 'the population.' The present Government of the Hawaiian Islands, recognized by Japan and other countries, has been in existence for a series of years, during which time public peace and social order have been maintained, and the country has enjoyed an era of unprecedented prosperity. The Government of the United States sees no reason to question its complete sovereignty, or its right to express the national will."[10]

§ 271. **Rules of international law.**—It was contended by the government of Chile that a sovereign, when occupying a conquered territory, possessed, by the principles of international law, the right to test titles acquired under his predecessor, by applying to them the municipal law of his own government, and not the municipal law of its predecessor, or under which they were vested. Mr. Bayard, Secretary of State, in answering this contention, cited the cases holding that the rights acquired under the prior Mexican and Spanish law were "consecrated by the law of nations," and said: "The Government of the United States, therefore, holds that titles derived from a duly constituted prior foreign government to which it has succeeded are 'consecrated by the law of nations' even as against titles claimed under its own subsequent laws. The rights of a resident neutral—having become fixed and vested by the law of the country cannot be denied or injuriously affected by a change in the sovereignty or public control of that country by transfer to another government. His remedies may be affected by the change of sovereignty but his *rights* at the time of the change must be measured and determined by the law under which he acquired them. . . . . The Government of the United States is therefore prepared to insist

[10] MS. Notes to Japanese Legation, I, 533, 535; 1 Moore Int. L. D. 274.

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on the continued validity of such titles, as held by citizens of the United States, when attacked by foreign governments succeeding that by which they were granted. Title to land and landed improvements is by the law of nations, a continuous right, not subject to be devested by any retroactive legislation of new governments taking the place of that by which such title was lawfully granted. Of course it is not intended here to deny the prerogative of a conqueror to confiscate for political offenses, or to withdraw franchises which by the law of nations can be withdrawn by governments for the time being. Such prerogatives have been conceded by the United States as well as by other members of the family of nations by which international law is constituted. What, however, is here denied is the right of any government to declare titles lawfully granted by its predecessor to be vacated because they could not have been lawfully granted if its own law had, at the time in question, prevailed. This pretension strikes at that principle of historical municipal continuity of governments which is at the basis of international law."[11]

§ 272. **Samoan and Gilbert Islands.**—Mr. Bayard expressed himself similarly when the operations of Germany in the Samoan Islands were reported. He said that there were islands in the Pacific Ocean known to be wholly in the undisturbed possession of American citizens as peaceable settlers, and others in which American citizens have established themselves in common with other foreigners. While the United States claimed no jurisdictional right by reason of such occupancy, and were not called upon to admit it in the case of like occupancy by others, he stated: "What we think we have a right to expect, and what we are confident will be cheerfully extended as a recognized right, is that interests found to have been created in favor of peaceful American settlers in those distant regions shall not be disturbed by the assertion of exclusive claims of territorial jurisdiction on the part of any power which has never put forth any show of administration therein; that their trade and intercourse shall not in any way be hampered or taxed otherwise than as trade and intercourse of the citizens or subjects of the power asserting such exclusive jurisdiction, and in short, that

[11] Mr. Bayard, Secretary of State, to Mr. Roberts, March 20, 1886, MS. Inst. Chile, XVII, 196, 200; 1 Moore Int. L. D. 422.

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the equality of their tenancy jointly with others or the validity of their tenancy where they may be the sole occupants, shall be admitted according to the established principles of equity and justice."[12] In 1892 Mr. Foster, Secretary of State, wrote to Mr. White, chargé at London, with reference to the extension of a protectorate by Great Britain over the Gilbert Islands, asking him to take an early occasion to make the views expressed by him known to Lord Roseberry. "You will say to him that the government believes that it has a right to expect that the interests of the American citizens established in the Gilbert Islands will be as fully respected and confirmed under her Majesty's protectorate as they could have been had the United States accepted the office of protection not long since solicited by the rulers of those islands." To this Lord Roseberry replied that the rights and interests of American citizens would be fully recognized and respected by the British authorities.[13]

§ 273. Titles not devested.—Where a grant of land in Florida was binding upon Spain before the acquisition of Florida, it is also binding in the United States.[14] The cession of Texas did not devest the title of a citizen of Mexico to lands.[15] When New Mexico was acquired, the people retained their private vested rights and all other rights originating in contract or usage and which were not in conflict with the laws of the United States.[16] A title is valid which was acquired under a Spanish grant, after the cession of Louisiana to the United States, but before the taking of possession.[17] When Texas acquired its independence, alienage alone did not forfeit the title to land in that state.[18]

[12] Mr. Bayard, Secretary of State, to Mr. Pendleton, February 27, 1886, MS. Inst. Germany, XVII, 602; 1 Moore Int. L. D. 423. Similar expressions were made by Mr. Bayard in reference to the exercise of a protectorate by Portugal over the entire sea coast of Dahomey. Mr. Bayard, Secretary of State, to the Viscount das Nogueiras, Portuguese Minister, March 3, 1886, For. Rel. 1886, 772; and also in reference to the placing of the groups known as Marshall, Brown and Providence under the protection of Germany. Mr. Bayard, Secretary of State, to Mr. von Alvensteben, German Minister, March 4, 1886, For. Rel. 1886, 333.

[13] For. Rel. 1892, 237, 239, 246.

[14] United States v. Clarke, 16 Pet. (U. S.) 232, 10 L. ed. 947.

[15] Arihart v. Massieu, 98 U. S. 496, 25 L. ed. 215.

[16] Leitensdorfer v. Webb, 20 How. 177, 15 L. ed. 891.

[17] Pollard v. Kibbe, 14 Pet. 375, 10 L. ed. 501.

[18] Jones v. McMasters, 20 How. (U. S.) 20, 15 L. ed. 810.

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The act of Congress confirming a title which existed before the territory was ceded is equivalent in its effect to a conveyance of grant or quitclaim.[19]

§ 274. Tide lands previously granted.—In the United States supreme court the law is well settled that absolute property in and dominion and sovereignty over the land under tide waters in the original states were reserved to the several states. New states admitted into the Union possess the same rights, sovereignty and jurisdiction in relation to the soils under tide waters as belong to the original states within their respective limits.[20] When the United States acquired title to territory from Mexico, it acquired title both to tide lands and to upland. But it held the title to the tide lands only in trust for the future states that

[19] Langdeau v. Hanes, 21 Wall. 527, 22 L. ed. 608. For various cases relating to the effect produced upon the rights of inhabitants in the ceded territory by a change of sovereignty see Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769; Hornsby v. United States, 10 Wall. (U. S.) 224, 19 L. ed. 900; Delassus v. United States, 9 Pet. (U. S.) 118, 9 L. ed. 71; Chouteau v. United States, 9 Pet. (U. S.) 138, 9 L. ed. 78; Strother v. Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137; Slidell v. Grandjean, 111 U. S. 412, 4 Sup. Ct. Rep. 475, 28 L. ed. 321; United States v. Moreno, 1 Wall. (U. S.) 400, 17 L. ed. 633; Dent v. Emmeger, 14 Wall. 308, 20 L. ed. 838; Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. Rep. 407, 28 L. ed. 908; United States v. Chaves, 159 U. S. 452, 16 Sup. Ct. Rep. 57, 40 L. ed. 215; Kinkead v. United States, 150 U. S. 483, 14 Sup. Ct. Rep. 172, 37 L. ed. 1152; Ainsa v. United States, 161 U. S. 208, 16 Sup. Ct. Rep. 544, 40 L. ed. 673; United States v. Flint, 4 Saw. 42, 25 Fed. Cas. No. 15,121, affirmed, 98 U. S. 61; Callsen v. Hope, 75 Fed. 758; Coburn v. San Mateo County, 75 Fed. 520; Muse v. Arlington Hotel, 68 Fed. 637; May v. Specht, 1 Mich. 187; Puget Sound Agricultural Co. v. Pierce County, 1 Wash. Ter. 159; Eslava v. Doe, 7 Ala. 543; Woodworth v. Fulton, 1 Cal. 295; Ferris v. Coover, 10 Cal. 589; Leese v. Clark, 20 Cal. 388; Ward v. Mulford, 32 Cal. 365; Thompson v. Doaksum, 68 Cal. 593, 10 Pac. 199; Wilson v. Smith, 5 Yerg. (Tenn.) 379; McMullen v. Hodge, 5 Tex. 34; Trimble v. Smithers, 1 Tex. 790; Blair v. Odin, 3 Tex. 288; Paul v. Perez, 7 Tex. 338; Swift v. Herrera, 9 Tex. 263; Jones v. Montes, 15 Tex. 351; Kilpatrick v. Sisneros, 23 Tex. 113; Maxey v. O'Connor, 23 Tex. 234; Musquis v. Blake, 24 Tex. 461; Sabriego v. White, 30 Tex. 576; Ortiz v. De Benavides, 61 Tex. 60.

[20] Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Goodtitle v. Kibbe, 9 How. 471, 13 L. ed. 220; Mumford v. Wardwell, 6 Wall. 423, 18 L. ed. 756; Weber v. Harbor Commissioners, 18 Wall. 57, 21 L. ed. 798.

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might be created out of such territory. This rule, however, has no application to lands previously granted to other parties by the former government, or made subject to trusts requiring some other disposition of such lands. There is no doubt that when California was acquired from Mexico by the United States, under the treaty of Guadalupe Hidalgo, the United States was obligated to protect all rights of property in California proceeding from the government of Mexico before the execution of the treaty.[21] The eighth article of that treaty contains a stipulation to that effect;[22] but even if such provision was absent, the obligations resting upon the United States, in so far as the protection of property right is concerned, would, under the principles of international law, have been the same.[23]

§ 275. Grants made by states in case of disputed boundaries.— The only government having power to make a valid grant of lands is that state in whose territory the land actually lies, and hence grants of land made by a government in territory over which it exercises political jurisdiction *de facto,* but to which it rightfully has no claim, are not valid as against the government which has the right to exercise jurisdiction over such territory. In the case of disputed boundaries between two states, the title to the land will depend upon the decision ultimately of which

[21] Knight v. United States Land Assn., 142 U. S. 184, 12 Sup. Ct. Rep. 258, 35 L. ed. 982; Teschemacher v. Thompson, 18 Cal. 11, 79 Am. Dec. 151; Beard v. Federy, 3 Wall. 478, 18 L. ed. 88; San Francisco v. Le Roy, 138 U. S. 656, 11 Sup. Ct. Rep. 364, 34 L. ed. 1096.

[22] 9 Stats. at Large, 922.

[23] Knight v. United States Land Assn., 142 U. S. 184, 12 Sup. Ct. Rep. 258, 35 L. ed. 982; Soulard v. United States, 4 Pet. 511, 7 L. ed. 938; United States v. Percheman, 7 Pet. 51, 8 L. ed. 604; Strother v. Lucas, 12 Pet. 410, 9 L. ed. 1137; United States v. Repentigny, 5 Wall. 211, 18 L. ed. 627. Title to tide lands in California is in the state, except where, before cession to the United States by the Mexican government, grants were made by the latter. Coburn v. United States, 75 Fed. 528. And see Tripp v. Spring, 5 Saw. 209, 24 Fed. Cas. No. 14,180; Coburn v. San Mateo County, 75 Fed. 520; People v. San Francisco, 75 Cal. 388, 17 Pac. 522; Valentine v. Sloss, 103 Cal. 215, 37 Pac. 326; Ward v. Mulford, 32 Cal. 365; Teschemaker v. Thompson, 18 Cal. 11, 79 Am. Dec. 151. See, also, United States v. Chaves, 159 U. S. 457, 16 Sup. Ct. Rep. 59, 40 L. ed. 218. As to the rights reserved of Indians in parts of territory ceded to the government, see Godfrey v. Beardsley, 2 McLean, 418, Fed. Cas. No. 5497.

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state had jurisdiction. When the disputed boundary is adjusted and settled, grants previously made by either state of lands claimed by it, and over which it has exercised political sovereignty, but which, on the final adjustment of the boundary, are determined to be within the limits of the other state, are void unless confirmed by the latter state. Even if such confirmation should be made, it cannot injure the title of the same lands which the latter state itself had previously granted.[24]

[24] Coffee v. Groover, 123 U. S. 10, 8 Sup. Ct. Rep. 5, 31 L. ed. 56. The supreme court of Florida held that grants in a disputed territory, by a government exercising sovereign jurisdiction in such state, were valid and to be sustained, notwithstanding that by a subsequent settlement of boundaries, the disputed territory is conceded to the other contesting sovereign. The supreme court of the United States reversed the judgment, Mr. Justice Bradley, who delivered the opinion of the court, saying: "It is no doubt the received doctrine, that in cases of ceded or conquered territory, the rights of private property in lands are respected. Grants made by the former government, being rightful when made, are not usually disturbed. Allegiance is transferred from one government to the other without any subversion of property. This doctrine has been laid down very broadly on several occasions by this court—particularly in cases arising upon grants of land made by the Spanish and other governments in Louisiana and Florida before those countries were ceded to the United States. It is true that the property rights of the people, in those cases, were protected by stipulations in the treaties of cession, as is usual in such treaties; but the court took broader ground, and held, as a general principle of international law, that a mere cession of territory only operates upon the sovereignty and jurisdiction, including the right to the public domain, and not upon the private property of individuals which had been segregated from the public domain before the cession. This principle is asserted in the cases of United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; United States v. Percheman, 7 Pet. 51, 86-89, 8 L. ed. 604; Delassus v. United States, 9 Pet. 117, 9 L. ed. 71; Strother v. Lucas, 12 Pet. 410, 428, 9 L. ed. 1137; Doe v. Eslava, 9 How. 421, 13 L. ed. 200; Jones v. McMasters, 20 How. 8, 17, 15 L. ed. 805, and Leitensdorfer v. Webb, 20 How. 176, 15 L. ed. 891. In United States v. Percheman, Chief Justice Marshall said: 'It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule

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§ 276. What are property rights.—While there can be no doubt that inhabitants of a ceded territory are entitled to protection in the full enjoyment of their property, the question has sometimes arisen as to what are property rights. Preliminarily, we can do no better than to quote the language of Mr. Chief Justice Marshall, who, in an early case involving the protection given by treaty, said: "The term 'property,' as applied to lands, comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory, as well as those which are executed. In this respect, the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away."[52]

An adverse homestead entry will not affect a grant in Michigan territory, which in accordance with the provisions of Jay's treaty is subsequently confirmed by the United States.[26] The law, as well as the treaty of Guadalupe Hidalgo, protects titles perfected under Spanish or Mexican grants,[27] and grants made by Mexican

even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change.' 7 Pet. 86, 87, 8 L. ed. 604.

"But whilst this is the acknowledged rule in cases of ceded and even conquered territory, with regard to titles acquired from a former sovereign who had undoubted right to create them, it does not apply (as we shall see) to cases of disputed boundary, in relation to titles created by a sovereign in possession, but not rightfully so. In the latter case, when the true boundry is ascertained, or adjusted by agreement, grants made by either sovereign beyond the limits of his rightful territory, whether he had possession or not (unless confirmed by proper stipulations), fail for want of title in the grantor. This is the general rule. Circumstances may possibly exist which would make valid the grants of a government *de facto;* as, for example, where they contravene no other rights. Grants of public domain made by Napoleon as sovereign *de facto* of France may have had a more solid basis of legality than similar grants made by him as sovereign *de facto* of a Prussian province, derogatory to the rights of the government and King of Prussia." Coffee v. Groover, 123 U. S. 10, 8 Sup. Ct. Rep. 5, 31 L. ed. 56.

[25] Soulard v. United States, 4 Pet. 512, 7 L. ed. 938.

[26] Sanborn v. Vance, 69 Mich. 226, 37 N. W. 273.

[27] Minturn v. Brower, 24 Cal. 644.

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officers in compliance with the Mexican laws applicable to California are valid.[28]

§ 277. **Subsequent acts of Congress.**—Subsequent acts of Congress confirming Spanish concessions for the shore will not impair riparian rights of lot owners who have bought in accordance with prior acts of Congress;[29] but a title to land in Louisiana, which is completed by a grant from the crown of Spain, will overcome a title claimed under an act of Congress.[30]

It was held that a grant made by the British government is valid notwithstanding the fact that as subsequently established by treaty the land lies within the boundaries of the United States.[31] Where a grant has been perfected under Spanish authority, the land affected became private property. Consequently, upon the cession of Louisiana such land did not pass to the United States.[32] A change of sovereignty will not defeat the title of Pueblo Indians to lands.[33] Until a legislative enactment makes a contrary provision, a ceded territory will retain its system of laws.[34]

§ 278. **Property includes every species of title.**—The term "property" used in treaties of cession includes every species of title, inchoate or complete, legal or equitable, and comprehends rights which lie in contract, executory as well as executed.[35] The rights of private property were not impaired by the cession of California to the United States, and the act of Congress to ascertain and settle private land claims in that state was passed for the purpose of assuring to the inhabitants of the territory ceded the benefit of the rights of property which the treaty secured to them. This act recognized both legal and equitable rights, and the court held that it should be administered in a liberal spirit.[36] All incomplete title acquired in a ceded territory

[28] Reynolds v. West, 1 Cal. 326; Vanderslice v. Hanks, 3 Cal. 38.

[29] Abbots v. Kennedy, 5 Ala. 396.

[30] Hall v. Root, 19 Ala. 386.

[31] Little v. Watson, 32 Me. 214.

[32] Roussin v. Parks, 8 Mo. 539.

[33] United States v. Lucero, 1 N. Mex. 429.

[34] Browning v. Browning, 3 N. Mex. 467 (371) [659], 9 Pac. 677; Barnett v. Barnett, 9 N. Mex. 205, 50 Pac. 337; Chavez v. Chavez, 7 N. Mex. 69, 32 Pac. 140.

[35] Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. Rep. 407, 28 L. ed. 908.

[36] United States v. Moreno, 1 Wall. (U. S.) 400, 17 L. ed. 633. Cited in Town v. De Haven, 5 Saw. 149, Fed. Cas. No. 14,113; Crystal etc. Co. v. Los Angeles, 76 Fed. 153.

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prior to a treaty is such a property interest as can be transferred by mortgage or reached by judicial process.[37]

Spain, while in possession of territory afterward ceded, had power to make grants founded on any consideration, and had absolute discretion to impose any restriction.[38] Property rights were not devested by the revolutions in Texas.[39]

§ 279. Copyrights, patents and trademarks.—Copyrights and patents may be protected under treaties of cession, though the law of the United States may not give similar rights. It was provided in article XIII of the treaty of peace between the United States and Spain of December 10, 1898, that the rights of property secured by copyrights and patents acquired by Spaniards in Cuba, Porto Rico and the Philippines should be respected. A patent or license had been granted on July 11, 1898, to a Spaniard for the manufacture of hemp by steam in the Philippines for a period of five years. In the opinion of the attorney general of the United States this patent was protected by the treaty if it was valid under Spanish law, as the laws of Spain concerning industrial property were in the contemplation of the framers of this article of the treaty. In the English copy of the treaty, article XIII provided that: "The rights of property secured by copyrights and patents acquired by Spaniards in the island of Cuba, and in Porto Rico, the Philippines, and other ceded territories, at the time of the exchange of the ratifications of this treaty, shall continue to be respected," while in the Spanish copy the article, instead of "rights of property secured by copyrights and patents acquired by Spaniards," reads, "the rights of property, literary, artistic, and industrial, acquired by Spaniards."[40]

[37] Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. Rep. 407, 28 L. ed. 908. See, also, Doe v. Latimer, 2 Fla. 71.

[38] United States v. Clarke, 16 Pet. (U. S.) 228, 10 L. ed. 946.

[39] Trimble v. Smithers, 1 Tex. 790; Ortiz v. De Benavides, 61 Tex. 60; Sabriego v. White, 30 Tex. 576; Maxey v. O'Connor, 23 Tex. 234; Jones v. Montes, 15 Tex. 351.

[40] 22 Op. Attys. Gen. 617. Mr. Griggs, Attorney General, said: "The treaty in Spanish, like the law of 1878, speaks of industrial property. It concerns only Spanish rights acquired under Spanish laws; and the framers of it must be presumed to have known something of those rights and laws of which they were treating, and to have had in mind such laws as that of July 30, 1878, corresponding to our laws relating to patents. In English, the words 'industrial property' become 'patents.' I think it reasonable

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those rights appertains to the political department of the government.[45]

§ 282. Delegation to judicial department.—Congress may perform that duty either by itself or it may delegate it to the judicial department.[46] A private claim under the acts of Congress relating to lands in Arizona under a Mexican grant, which has been reported to Congress by the surveyor-general of the territory, cannot be contested in the courts before action by Congress on his report.[47]

Unless Congress has otherwise provided, a survey made by the land department within the scope of its authority of a confirmed Mexican grant is unassailable in the courts in a collateral proceeding.[48] "It has often been held by this court that the judicial tribunals, in the ordinary administration of justice, had no jurisdiction or power to deal with these incipient claims, either as to fixing boundaries by survey, or for any other purpose; but that claimants were compelled to rely upon Congress, on which power was conferred by the Constitution to dispose of and make all needful rules and regulations respecting the territory and property of the United States. Among these needful regulations was that of providing that these unlocated claims should be surveyed by lawful authority; a consideration that has occupied a prominent place in the legislation of Congress from an early day."[49]

chal v. Dangerfield, 37 Tex. 273; Walters v. Jewett, 28 Tex. 192; Peck v. Moody, 23 Tex. 93; Hamilton v. Avery, 20 Tex. 612; Patton v. Skidmore, 19 Tex. 533; Hancock v. McKinney, 7 Tex. 384; Paschal v. Perez, 7 Tex. 348; Howard v. Perry, 7 Tex. 259; Hughes v. Lane, 6 Tex. 289; Jones v. Borden, 5 Tex. 410; McMullen v. Hodge, 5 Tex. 34; Kemper v. Victoria, 3 Tex. 135; Norton v. General Land Office Commissioner, 2 Tex. 357; Jones v. Menard, 1 Tex. 771; Trimble v. Smithers, 1 Tex. 790.

[45] Tameling v. United States Freehold etc. Co., 93 U. S. 644, 23 L. ed. 998.

[46] Astiazaran v. Santa Rita Min. Co., 148 U. S. 80, 13 Sup. Ct. Rep. 457, 37 L. ed. 377; De la Croix v. Chamberlain, 12 Wheat. (U. S.) 599, 6 L. ed. 741; Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. Rep. 525, 32 L. ed. 926.

[47] Astiazaran v. Santa Rita Min. Co., 148 U. S. 80, 13 Sup. Ct. Rep. 457, 37 L. ed. 377.

[48] Stoneroad v. Stoneroad, 158 U. S. 248, 15 Sup. Ct. Rep. 822, 39 L. ed. 969.

[49] West v. Cochran, 58 U. S. (17 How.) 403, 15 L. ed. 110, per Mr. Justice Catron, speaking for the court. Mr. Justice Lamar said: "It is a well-settled rule of law that the power to make and correct surveys of

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While the supreme court of the United States under the judiciary act of 1789 had no jurisdiction to examine a perfect Spanish title, and decide whether due effect had been given to it by the state court, yet if an imperfect Spanish title has been acted on by Congress, and the supreme court of the United States is called upon to review the decision of a state court, the Spanish title must be examined for the purpose of determining what effect was produced upon it by the act of Congress.[50]

§ 283. Incomplete titles not made complete.—The treaty by which Louisiana was acquired did not make incomplete titles complete. The government of the United States became the successor to the crown of Spain in its powers and duties as to confirmations of such titles, and might select between two adverse claimants and give a perfect title to one and absolutely exclude the other.[51] The local courts of a territory have no power to adjudicate the title claimed under a Spanish grant when the title to the property under the treaty of Guadalupe Hidalgo and the act of Congress was *sub judice*, the claimants proceeding under the act before the surveyor-general and Congress.[52] Until Congress gives to inchoate rights of imperfect obligation a vitality and an effect which they did not before possess, they are of such a nature that they cannot be recognized nor enforced in a court of law or equity. When confirmation was made by Congress, such rights took their effect wholly from the act of confirmation, and not from any element derived from antecedent sovereignty which entered into their existence, and hence the title of an elder confirmee was better than that of a younger, without regard to the date of the origin of their respective claims or the circumstances by which they were attended.[53]

the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except in a direct proceeding." Knight v. United Land Assn., 142 U. S. 161, 12 Sup. Ct. Rep. 258, 35 L. ed. 974; Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. Rep. 203, 32 L. ed. 566.

[50] Chouteau v. Eckhart, 2 How. (U. S.) 344, 11 L. ed. 293.

[51] Chouteau v. Eckhart, 2 How. (U. S.) 344, 11 L. ed. 293.

[52] Rio Arriba Land & Cable Co. v. United States, 167 U. S. 298, 17 Sup. Ct. Rep. 875, 42 L. ed. 175.

[53] Dent v. Emmeger, 14 Wall. 308, 20 L. ed. 838.

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§ 284. **Grant deemed abandoned.**—If the land is held by a title imperfect or equitable merely, under a Mexican colonization grant in the usual form, which required approval of the Departmental Assembly, and judicial possession from the magistrate of the vicinage, and which was for a certain quantity of land within exterior limits embracing a much greater quantity, the grant, unless it is presented for confirmation to the United States Board of Land Commissioners, will be deemed abandoned. Whatever may have been its original validity, the courts will treat it as nonexistent. When a person bases a claim upon the unconfirmed grant, the land will be regarded as public land of the United States.[54] It is only by a patent, or a survey confirmed in accordance with the act of Congress, that the claimant of a Mexican grant, whose title is not perfect, acquires a perfect title.[55]

§ 285. **Collateral attack.**—A patent thus issued for a Mexican grant of land becomes a record equally binding the government, the claimant and those deriving title through him. It is not subject to collateral attack, but can be assailed only by direct proceedings instituted for that purpose.[56] A concession will not confer upon the grantee a perfect title to any specific parcel of land in the absence of anything in the grant or in the documents to which it refers by which to fix the lines of one of the sides of the tract intended to be conveyed, or to determine the particular quantity. It must appear, on the face of the instrument, or by the aid of its descriptive portions, not only that it was intended to grant a specific parcel, but the description must be such that the particular tract intended to be granted can, with reasonable certainty, be identified.[57] A Mexican grant is inchoate or imperfect where a survey, or judicial possession by competent authority, was necessary in order to attach it to any specific tract of land.[58] Where the United States has recognized and confirmed the validity of a claim under a Mexican grant, and issued a patent to the claimant, the rights of the

[54] Estrada v. Murphy, 19 Cal. 248.
[55] Chipley v. Farris, 45 Cal. 527.
[56] Chipley v. Farris, 45 Cal. 527.
[57] Banks v. Moreno, 39 Cal. 233.
[58] Steinbach v. Moore, 30 Cal. 498.

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patentee cannot be questioned, either in law or in equity, by another who relies solely upon an opposing unconfirmed grant from the Mexican government. Even if the patentee obtained a confirmation of his claim with knowledge of the claim of the other, no equities could arise in favor of the latter from such knowledge, nor was the patentee affected by such knowledge with a notice of any equitable rights of the other claimant.[59] But it was necessary to submit only inchoate and imperfect titles for confirmation. Change of sovereignty did not affect titles which had been acquired and established from the governments of either Spain or Mexico. Persons holding perfect titles to lands in California were protected by the treaty in their ownership and enjoyment to the same extent as if no change in sovereignty had occurred. On this ground it was held in the early cases that a failure to present their claims for confirmation did not cause a forfeiture of their lands to the governments.[60] The provisions of the treaty under which California was acquired, it was held in the early cases, operated as a confirmation *in praesenti* of all perfect titles to lands dependent upon Spanish or Mexican grants made prior to the ratification of the treaty.[61]

§ 286. **Perfected claims before land commission.**—The supreme court of the United States held that there was nothing in the language of the act creating the land commission to imply any exclusion of perfected claims from the jurisdiction of the commission. The language of the statute contained no hint or attempt at any distinction as to the claims to be presented between perfect claims and those which were imperfect in their character. The court held that there was no reason in the policy upon which the statute was founded and the purposes it was intended to subserve why a distinction should be made between the two classes of claims. The statute was not intended to adjust titles between private persons asserting claim to the same lands, but its main purpose was to separate and distinguish the lands owned by the United States as property, which the government could sell to others either absolutely or by extending to them pre-emption

[59] Rico v. Spence, 21 Cal. 504.

[60] Minturn v. Brower, 24 Cal. 644. But see the later cases of Tuffree v. Polhemus, 108 Cal. 670, 41 Pac. 808; De Toro v. Robinson, 91 Cal. 371, 27 Pac. 671; Anzar v. Miller, 90 Cal. 342, 27 Pac. 299.

[61] Minturn v. Brower, 24 Cal. 644.

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rights, or which might be entirely reserved from public sale, from those lands which belonged to private persons either in a legal or equitable sense, under a claim of right derived from the governments of Spain or Mexico. The later California decisions accepted this rule.[62] As long, however, as a grant of land in California made by Mexico was inchoate or imperfect, the Mexican government had the power to determine the validity of the grant and give it precise location as long as the territory remained under the dominion of that government. This power passed to the United States upon the cession of California, and when the power is exercised by the United States the grantee is bound by its decision.[63]

§ 287. **Measuring of land.**—If, while the ceded territory was under the dominion of Mexico, a grant of land required as one of its conditions that the land should be measured by the proper officer, and judicial possession should then be given to the grantee, the legal title remained in the Mexican government until such measurement and delivery of possession. By a grant with such a condition, the grantee acquired only an imperfect and inchoate title.[64]

§ 288. **Titles complete at time of cession.**—Titles which have become vested are not affected by the cession. Only the sovereign is displaced, but private property is not confiscated and private rights are not destroyed. The relations of the people to each other are not altered, although their allegiance may be. When territory is ceded by treaty, it is not understood that property belonging to its inhabitants is affected, because lands previously granted are not within the power of one sovereignty to

[62] Botiller v. Dominguez, 130 U. S. 247, 9 Sup. Ct. Rep. 525, 32 L. ed. 926, reversing 74 Cal. 457, 16 Pac. 241; Astiazaran v. Santa Rita Min. Co., 148 U. S. 82, 13 Sup. Ct. Rep. 457, 37 L. ed. 376; Stoneroad v. Stoneroad, 158 U. S. 248, 15 Sup. Ct. Rep. 825, 39 L. ed. 969; Houston v. San Francisco, 47 Fed. 339; Anzar v. Miller, 90 Cal. 343, 27 Pac. 299; De Toro v. Robinson, 91 Cal. 376, 27 Pac. 673; De la Guerra v. Santa Barbara, 117 Cal. 533, 49 Pac. 735; Harvey v. Barker, 126 Cal. 272, 58 Pac. 696; Ainsa v. New Mexico etc. R. R. Co., 175 U. S. 84, 20 Sup. Ct. Rep. 33, 44 L. ed. 78; Tuffree v. Polhemus, 108 Cal. 675, 41 Pac. 806.

[63] De Arguello v. Greer, 26 Cal. 615.

[64] De Arguello v. Greer, 26 Cal. 615.

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transfer to another.[65] Still, such titles may require confirmation by the political power or some agency appointed or created by it.[66]

[65] United States v. Percheman, 7 Pet. (U. S.) 52, 8 L. ed. 604; United States v. Arredondo, 6 Pet. (U. S.) 692, 8 L. ed. 547; United States v. Waterman, 14 Pet. (U. S.) 478, 10 L. ed. 550; United States v. Wiggins, 14 Pet. (U. S.) 334, 10 L. ed. 481; United States v. King, 3 How. (U. S.) 773, 11 L. ed. 824, 7 How. (U. S.) 883, 11 L. ed. 829; United States v. Reynes, 9 How. (U. S.) 127, 13 L. ed. 74; Barry v. Gamble, 3 How. (U. S.) 32, 11 L. ed. 479; Doe v. Eslava, 9 How. (U. S.) 421, 13 L. ed. 200; Doe v. Mobile, 9 How. (U. S.) 451, 13 L. ed. 212; United States v. Power, 11 How. (U. S.) 570, 13 L. ed. 817; United States v. Philadelphia, 11 How. (U. S.) 609, 13 L. ed. 834; United States v. Roselius, 15 How. (U. S.) 36, 14 L. ed. 590; United States v. Castant, 12 How. (U. S.) 437, 13 L. ed. 1056; United States v. McCullagh, 13 How. (U. S.) 216, 14 L. ed. 118; United States v. Pillerin, 13 How. (U. S.) 9, 14 L. ed. 28; United States v. D'Auterieve, 15 How. (U. S.) 14, 14 L. ed. 580, 101 U. S. 700, 25 L. ed. 869; United States v. Ducros, 15 How. (U. S.) 38, 14 L. ed. 591; Ainsa v. New Mexico etc. R. Co., 175 U. S. 76, 20 Sup. Ct. Rep. 28, 44 L. ed. 78; Maguire v. Taylor, 8 Wall. (U. S.) 650, 19 L. ed. 320; Smyth v. New Orleans Canal Co., 93 Fed. 899, 35 C. C. A. 646; Trenier v. Stewart, 101 U. S. 797, 25 L. ed. 1021; Muse v. Arlington Hotel Co., 68 Fed. 637; Mitchel v. United States, 9 Pet. 734, 9 L. ed. 291; Strother v. Lucas, 12 Pet. 436, 9 L. ed. 1147; United States v. Clarke, 16 Pet. 232, 10 L. ed. 947; Baldwin v. Goldfrank, 88 Tex. 249, 31 S. W. 1064; State v. Sais, 47 Tex. 307; Swift v. Herrera, 9 Tex. 263; Hancock v. McKinney, 7 Tex. 384; Edwards v. James, 7 Tex. 372; Smith v. State, 5 Tex. 397; Hardy v. De Leon, 5 Tex. 211; McMullen v. Hodge, 5 Tex. 34; Jones v. Menard, 1 Tex. 771; White v. Wells, 5 Mart. (O. S.) 652; Sanchez v. Gonzales, 11 Mart. (O. S.) 207; Murdock v. Gurley, 5 Rob. (La.) 457; Lavergne v. Elkins, 17 La. 220; Kittridge v. Hebert, 9 La. Ann. 154; Nixon v. Houillon, 20 La. Ann. 515; McGee v. Doe, 9 Fla. 382; Doe v. Roe, 13 Fla. 602; Keech v. Enriquez, 28 Fla. 597, 10 South. 91; Wilson v. Smith, 5 Yerg. (Tenn.) 379.

[66] Thompson v. Los Angeles Farming Co., 180 U. S. 72, 21 Sup. Ct. Rep. 289, 45 L. ed. 432; Baker v. Harvey, 181 U. S. 481, 21 Sup. Ct. Rep. 690, 45 L. ed. 963; Ainsa v. New Mexico etc. R. Co., 175 U. S. 76, 20 Sup. Ct. Rep. 28, 44 L. ed. 78; Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. Rep. 525, 32 L. ed. 926; More v. Steinbach, 127 U. S. 70, 8 Sup. Ct. Rep. 1067, 32 L. ed. 51; Fremont v. United States, 17 How. (U. S.) 553, 15 L. ed. 241; United States v. Fossatt, 21 How. (U. S.) 445, 16 L. ed. 186; Tuffree v. Polhemus, 108 Cal. 670, 41 Pac. 806; De Toro v. Robinson, 91 Cal. 371, 27 Pac. 671; Anzar v. Miller, 90 Cal. 342, 27 Pac. 299; Houston v. San Francisco, 47 Fed. 337. But see Thompson v. Doaksum, 68 Cal. 597, 10 Pac. 199; Minturn v. Brower, 24 Cal. 644; Leese v. Clark, 20 Cal. 387; Gregory v. McPherson, 13 Cal. 562; Gunn v. Bates, 6 Cal. 263; Reynolds v. West, 1 Cal. 322.

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§ 289. **Act of Congress in conflict with treaty of cession.**—It is the duty of the courts to follow the statutory enactments of its own government when they conflict with a treaty of cession. If the government of the United States chooses to disregard the provisions of a treaty with a foreign nation, the courts have no power of constituting themselves instrumentalities for enforcing such provisions.[67]

§ 290. **Mexican titles in California after treaty.**—On March 3, 1851, Congress passed an act entitled "An act to ascertain and settle the private land claims in the state of California," which provided for the appointment of three commissioners. The act provided that every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government, should present the same to the commissioners with such evidence, documentary and oral, as he relied upon. The commissioners were to decide upon the validity of the claim and report the same with the reasons for the decision to the district attorney of the United States for the district for which the decision was rendered. In all cases of confirmation or rejection of any claim, either the claimant or the United States attorney, in behalf of the United States, might present a petition to the federal district court, praying it to review the decision of the commission, and to decide on the validity of the claim. The court, the act provided, should proceed to render judgment upon the pleadings and evidence, and was authorized to grant an appeal to the

Possessory rights may be protected prior to confirmation. Reynolds v. West, 1 Cal. 322; Sunol v. Hepburn, 1 Cal. 255; Gunn v. Bates, 6 Cal. 263; Soto v. Kroder, 19 Cal. 87; Wilson v. Smith, 5 Yerg. (Tenn.) 379; Pino v. Hatch, 1 N. Mex. 125; Chaves v. Whitney, 4 N. Mex. 178, 16 Pac. 608; Le Roy v. Wright, 4 Saw. (U. S.) 530, 15 Fed. Cas. No. 8273; Tobin v. Walkinshaw, McAll. (U. S.) 151, 23 Fed. Cas. No. 14,069; United States v. Parrott, McAll. (U. S.) 271, 27 Fed. Cas. No. 15,998.

[67] Botiller v. Dominguez, 130 U. S. 247, 9 Sup. Ct. Rep. 525, 32 L. ed. 926, reversing 74 Cal. 457, 16 Pac. 241; Astiazaran v. Santa Rita Min. Co., 148 U. S. 82, 13 Sup. Ct. Rep. 457, 37 L. ed. 376; Stoneroad v. Stoneroad, 158 U. S. 248, 15 Sup. Ct. Rep. 825, 39 L. ed. 969; Rio Arriba Land etc. Co. v. United States, 167 U. S. 309, 17 Sup. Ct. Rep. 880, 42 L. ed. 179. See, also, Chavez v. Chavez De Sanchez, 7 N. Mex. 82, 32 Pac. 144; Lockhart v. Willis, 9 N. Mex. 348, 54 Pac. 337; Apis v. United States, 88 Fed. 936; Grant v. Jaramillo, 6 N. Mex. 322, 28 Pac. 511.

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supreme court of the United States. The commissioners and the courts "in deciding on the validity of any claim brought before them under the provisions of this act shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the supreme court of the United States, so far as they are applicable."

It was further provided that all lands the claims to which should be finally rejected by the commissioners, or should be finally decided to be invalid by the courts, and all lands the claims to which should not be presented to the commissioners within two years after the date of the act, should be considered a part of the public domain of the United States.[68] In 1860 the act was amended by providing that whenever the surveyor-general should have caused any private land claim to be surveyed, he should give notice of the same by publication, and after the lapse of a certain time, the district courts were authorized, upon the application of any person interested, to make an order requiring the survey to be returned into court for examination and adjudication. On the return of the survey to the court, the parties were authorized to proceed to take testimony as to any matters necessary to show the true and proper location of the claim, and if, in the opinion of the court, the location and survey are erroneous, the court was authorized to set it aside or to correct and modify it.[69]

§ 291. **Effect of these acts.**—It would be beyond the scope of this work to notice, except in the briefest possible manner, the various phases of this legislation, or to enter at length into the various cases decided by the courts. It may be said, however, that by these acts the land that was subject to claims derived from Mexico or Spain was reserved from the public domain until all the parties interested had a full opportunity to present their claims for adjudication.[70] Parties interested in a claim are au-

[68] 9 Stats. at Large, 931.

[69] Stats. 1860; 12 Stats. at Large, 33.

[70] Newhall v. Sawyer, 92 U. S. 761, 23 L. ed. 769; Hosmer v. Wallace, 97 U. S. 575, 24 L. ed. 1130; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. Rep. 1228, 31 L. ed. 844; Middleton v. Low, 30 Cal. 596; Foss v. Hinkell, 78 Cal. 158, 20 Pac. 393. See for various cases under these statutes, Beard v. Federy, 3 Wall. (U. S.) 490, 18 L.

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thorized to employ the name of the original claimant in proceedings to establish the grant.[71]

Nothing more was contemplated by the act to settle Mexican claims in California than to separate lands owned by individuals from the public domain, and, therefore, jurisdiction exists in courts of equity to relieve against fraud or mistake, which jurisdiction may be exercised where a patent has been procured by one which belonged to another at the time of the issue of the patent. Where the relief sought is based upon a charge of secret fraud, and within a reasonable time after the discovery of the fraud suit was instituted, the defense of laches and the statute of limitations cannot prevail, nor can persons having notice of the adverse title at the time of purchase be deemed innocent purchasers.[72]

§ 292. Decree has effect of judgment.—Generally, the decree has the effect of a judgment. If no appeal is taken within the period fixed by statute, or if the decision is affirmed on appeal, the decree is conclusive and binding, both upon the claimant and the United States and their privies.[73] The patent, when

ed. 88; Peralta v. United States, 3 Wall. (U. S.) 434, 18 L. ed. 221; Townsend v. Greeley, 5 Wall. (U. S.) 335, 18 L. ed. 547; More v. Steinbach, 127 U. S. 70, 8 Sup. Ct. Rep. 1067, 32 L. ed. 51; United States v. Fossatt, 21 How. (U. S.) 445, 16 L. ed. 186; Swat v. United States, Hoffm. Land Cas. (U. S.) 230, 23 Fed. Cas. No. 13,680; Boulden v. Phelps, 12 Saw. (U. S.) 316, 30 Fed. 547; Frisbie v. Whitney, 9 Wall. (U. S.) 187, 19 L. ed. 668; Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; Beley v. Naphtaly, 169 U. S. 353, 18 Sup. Ct. Rep. 354, 42 L. ed. 775; United States v. Castillero, 2 Black (U. S.), 17, 17 L. ed. 360; Mora v. Foster, 3 Saw. 469, 17 Fed. Cas. No. 9784; Hosmer v. Wallace, 97 U. S. 575, 24 L. ed. 1130; Hays v. Steiger, 156 U. S. 387, 15 Sup. Ct. Rep. 412, 30 L. ed. 463; Estrada v. Murphy, 19 Cal. 248; Rush v. Casey, 39 Cal. 339; Taylor v. Escadon, 50 Cal. 428; Hastings v. McGoogin, 27 Cal. 85; Durfee v. Plaisted, 38 Cal. 80; Wormouth v. Gardner, 112 Cal. 506, 44 Pac. 806; Watriss v. Reed, 99 Cal. 134, 33 Pac. 775; Gresar v. McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863; United States v. Ritchie, 17 How. (U. S.) 525, 15 L. ed. 236; United States v. Pacheco, 20 How. (U. S.) 261, 15 L. ed. 820; Yturbide v. United States, 22 How. (U. S.) 290, 16 L. ed. 342; United States v. Morillo, 1 Wall. (U. S.) 706, 17 L. ed. 626.

[71] United States v. Sutter, 21 How. (U. S.) 170, 16 L. ed. 119.

[72] Meader v. Norton, 11 Wall. (U. S.) 442, 20 L. ed. 184.

[73] Malarin v. United States, 1 Wall. 282, 17 L. ed. 594; United States v. Fossatt, 21 How. (U. S.) 445, 16 L. ed. 186; Boyle v. Hinds, 2 Saw. 527,

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issued, is to be considered as a surrender by the United States of all interest in the land described in the patent.[74] The confirmation of a Mexican grant as well as the issue of a patent thereunder is operative in favor of the confirmee only and of those who claim under him. It establishes the legal title, but if in the presentation of the claim the confirmee acted in a fiduciary capacity, or with the intention of defrauding the real owner, the transfer of the legal title to the person equitably entitled to hold it will, upon a proper proceeding, be decreed by a court of equity.[75] A bill in chancery to set aside, on the ground of fraud, a judgment or decree between the same parties rendered by a court of competent jurisdiction will be sustained only for frauds extrinsic or collateral to the matter tried by the first court. A fraud which was an issue in the first suit cannot be considered.[76]

§ 293. Other statutes.—In 1854 Congress passed an act relating to public lands in New Mexico, which in section 8 provided

3 Fed. Cas. No. 1759; United States v. Payson, 1 Cal. Law J. 325, 27 Fed. Cas. No. 16,016; San Francisco v. United States, 4 Saw. 553, 21 Fed. Cas. No. 12,316; Mott v. Smith, 16 Cal. 550; Bernal v. Lynch, 36 Cal. 143; Gregory v. McPherson, 13 Cal. 574; Kimball v. Semple, 25 Cal. 454; Soto v. Kroder, 19 Cal. 87; Clark v. Lockwood, 21 Cal. 220; Mahoney v. Van Winkle, 21 Cal. 576.

[74] Beard v. Federy, 3 Wall. 478, 18 L. ed. 88; United States v. Conway, 175 U. S. 60, 20 Sup. Ct. Rep. 13, 44 L. ed. 72; Manning v. San Jacinto Tin Co., 7 Saw. 418, 9 Fed. 726; Hayner v. Stanly, 8 Saw. 214, 13 Fed. 217; Tripp v. Spring, 5 Saw. 209, 24 Fed. Cas. No. 14,180; Steinback v. Perkins, 58 Cal. 86; Waterman v. Smith, 13 Cal. 373; Pioche v. Paul, 22 Cal. 111; Waterman v. Smith, 13 Cal. 373; Hart v. Burnett, 15 Cal. 530; Miller v. Dale, 44 Cal. 578; Cruz v. Martinez, 53 Cal. 239; Carey v. Brown, 58 Cal. 180; Turner v. Donnelly, 70 Cal. 604, 12 Pac. 469; Adair v. White, 85 Cal. 313, 24 Pac. 663.

[75] De Castro v. Fellom, 135 Cal. 225, 67 Pac. 142. And see Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. 69; Byrne v. Alas, 74 Cal. 639, 16 Pac. 523; Mound City Land etc. Assn. v. Philip, 64 Cal. 497, 2 Pac. 270; McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421; Sherman v. McCarthy, 57 Cal. 507; Hartley v. Brown, 51 Cal. 465; Schmitt v. Giovanari, 43 Cal. 617; O'Connell v. Dougherty, 32 Cal. 462; Salmon v. Symonds, 30 Cal. 301; Emeric v. Penniman, 26 Cal. 124; Estrada v. Murphy, 19 Cal. 272; Clark v. Lockwood, 21 Cal. 220; United States v. Covilland, 1 Black (U. S.), 339, 17 L. ed. 40; Carpentier v. Montgomery, 13 Wall. (U. S.) 480, 20 L. ed. 698; Santa Clara Min. Assn. v. Quicksilver Min. Co., 8 Saw. (U. S.) 330, 17 Fed. 657; Miller v. Dale, 92 U. S. 473, 23 L. ed. 735.

[76] United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93. See, also,

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that: "It shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act."[77]

In 1870 Congress provided that it should be the duty of the surveyor-general of Arizona, "under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the origin, nature, character and extent of the claims to lands on said territory under the laws, usages and customs of Spain and Mexico; and for the purpose he shall have all the powers conferred, and shall perform all the duties enjoined upon the surveyor-general of New Mexico by the eighth section" of the act above cited.[78] In 1891 Congress established a court to be

San Pedro etc. Co. v. United States, 146 U. S. 120, 13 Sup. Ct. Rep. 94, 36 L. ed. 912; United States v. San Jacinto Tin Co., 125 U. S. 273, 8 Sup. Ct. Rep. 850, 31 L. ed. 747.

[77] 10 U. S. Stats. at Large, 309, sec. 8.

[78] 16 Stats. at Large, 304.

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called the court of private land claims, to have jurisdiction in the hearing and decision of private land claims "within the limits of the territory derived by the United States from the Republic of Mexico and now embraced within the territories of New Mexico, Arizona or Utah, or within the states of Nevada, Colorado or Wyoming, by virtue of any such Spanish or Mexican grant, concession, warrant or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States, which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise decided upon by lawful authority, and which are not already complete and perfect."[79] It was held that this court had no jurisdiction over a claim for the remainder of the land included in an alleged Mexican grant, which has been allowed only in part by act of Congress.[80] Nor did the act give the court jurisdiction over an inchoate claim incapable of assertion as an absolute right against the government of either Spain or Mexico, and subject to the uncontrolled discretion of Congress.[81]

§ 294. Preventing incorporation of ceded territory into United States.—The treaty-making power may insert in the treaty of cession conditions which will preclude, without the consent of Congress, the incorporation into the United States of territory acquired by treaty. If the treaty is not repudiated by Congress,

[79] 26 Stats. at Large, 854, March 3, 1891.

[80] Las Animas Land Grant Co. v. United States, 179 U. S. 201, 21 Sup. Ct. Rep. 92, 45 L. ed. 153.

[81] United States v. Santa Fe, 165 U. S. 675, 17 Sup. Ct. Rep. 472, 41 L. ed. 874. For various other cases involving this act, see Ainsa v. United States, 161 U. S. 208, 16 Sup. Ct. Rep. 544, 40 L. ed. 673; United States v. Sandavol, 167 U. S. 278, 17 Sup. Ct. Rep. 868, 42 L. ed. 168; Cessna v. United States, 169 U. S. 165, 18 Sup. Ct. Rep. 314, 42 L. ed. 702; United States v. Conway, 175 U. S. 60, 20 Sup. Ct. Rep. 159, 44 L. ed. 72; Ely v. United States, 171 U. S. 220, 18 Sup. Ct. Rep. 840, 43 L. ed. 142; United States v. Camou, 171 U. S. 277, 18 Sup. Ct. Rep. 855, 43 L. ed. 163; 184 U. S. 572, 22 Sup. Ct. Rep. 505, 46 L. ed. 694; Perrin v. United States, 171 U. S. 292, 18 Sup. Ct. Rep. 861, 43 L. ed. 169; Real de Dolores Del Oro v. United States, 175 U. S. 71, 20 Sup. Ct. Rep. 17, 44 L. ed. 76; Ainsa v. New Mexico etc. R. Co., 175 U. S. 76, 20 Sup. Ct. Rep. 28, 44 L. ed. 78; United States v. Chavez, 175 U. S. 509, 20 Sup. Ct. Rep. 159, 44 L. ed. 255; United States v. Martinez, 184 U. S. 441, 22 Sup. Ct. Rep. 422, 46 L. ed. 632; Reloj Cattle Co. v. United

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such conditions will have the force of the law of the land. The treaty by which the United States acquired Porto Rico and other territory providing that the civil rights and political status of the native inhabitants should be determined by Congress, manifested an express purpose to leave the status of the territory to the determination of Congress, but also to prevent the treaty from having a contrary effect.[82]

Congress has power by legislation to give effect to the treaty by which the United States agreed to assume and discharge the obligations that might, under international law, result from its occupation of Cuba or the protection of life and property in that island.[83]

§ 295. Inhabitants of ceded territory as citizens.—The treaties by which Louisiana, Florida, California and Alaska were acquired made the native-born inhabitants of those territories citizens of the United States. The treaty of Paris, by which Porto Rico was acquired, contained no such provision, but, on the contrary, declared: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Congress passed, in April, 1900, an act in conformity with this clause in the treaty declar-

States, 184 U. S. 624, 22 Sup. Ct. Rep. 499, 46 L. ed. 721; Ainsa v. United States, 184 U. S. 639, 22 Sup. Ct. Rep. 507, 46 L. ed. 727; United States v. Baca, 184 U. S. 653, 22 Sup. Ct. Rep. 541, 46 L. ed. 733; United States v. Green, 185 U. S. 256, 22 Sup. Ct. Rep. 640, 46 L. ed. 898; Lockhart v. Wills, 9 N. Mex. 263, 50 Pac. 318.

For decisions under other acts relating to land claims in Arizona and New Mexico, see Pinkerton v. Ledoux, 129 U. S. 346, 9 Sup. Ct. Rep. 399, 32 L. ed. 706; Tameling v. United States Freehold etc. Co., 93 U. S. 644, 23 L. ed. 998; Interstate Land Co. v. Maxwell Land Grant Co., 139 U. S. 569, 11 Sup. Ct. Rep. 656, 35 L. ed. 278; Shaw v. Kellogg, 170 U. S. 312, 18 Sup. Ct. Rep. 632, 42 L. ed. 1050; Central Colorado Imp. Co. v. Pueblo County, 95 U. S. 259, 24 L. ed. 495; Maxwell Land Grant Case, 121 U. S. 325, 7 Sup. Ct. Rep. 1015, 30 L. ed. 949; 122 U. S. 365, 7 Sup. Ct. Rep. 1271, 30 L. ed. 1211; Russell v. Maxwell Land Grant Co., 158 U. S. 253, 15 Sup. Ct. Rep. 827, 39 L. ed. 971; Maese v. Herman, 183 U. S. 572, 22 Sup. Ct. Rep. 91, 46 L. ed. 335; United States v. Cleveland etc. Cattle Co., 33 Fed. 323; Chaves v. Whitney, 4 N. Mex. 178, 16 Pac. 608; Colorado Fuel Co. v. Maxwell Land Grant Co., 22 Colo. 71, 43 Pac. 556.

[82] Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. Rep. 770, 45 L. ed. 1088.

[83] Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. Rep. 302, 45 L. ed. 448.

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ing: "That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, 1899, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States (excepting such as had preserved their allegiance to Spain), and they, together with such citizens of the United States as may reside in Porto Rico, shall continue a body politic under the name of 'The People of Porto Rico,' with governmental powers as hereinafter conferred, and with power to sue and be sued as such." An unmarried woman who arrived in the United States in 1902, a native of Porto Rico, was detained at the emigrant station, examined by a board of inquiry, and excluded from admission into the United States, upon the ground that she was liable to become a public charge. She presented a petition for a writ of *habeas corpus*, and the sole question before the court was, Was she a citizen or an alien? The court held that the act of Congress did not operate to naturalize her as a citizen of the United States, and that she remained an alien.[84]

§ 296. **Foreign corporations not subjects.**—The rule has been recognized that corporations are not subjects within the meaning of treaties. A corporation organized in Great Britain, having its principal place of business in that country, is not a subject of that country within the meaning of a treaty which gives to the subjects of that country the right to do business in any of the states of the Union on the same terms as native citizens.[85]

§ 297. **Effect of treaty on dam in Rio Grande.**—It was claimed in a suit brought by the United States to restrain an irrigation company from constructing a dam across the Rio Grande river in the territory of New Mexico, and appropriating the waters of that stream for the purposes of irrigation that the provision of the treaty of Guadalupe Hidalgo of 1848, securing the free and unobstructed navigation of that river, was violated. It was held in the lower court that there was no violation of the treaty, and in the supreme court of the United States it was held that the treaty was not involved. In the lower court it was decided that

[84] In re Gonzalez, 118 Fed. 941.

[85] Scottish Union etc. Ins. Co. v. Herriott, 109 Iowa, 606, 80 N. W. 665.

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the dam was not an obstruction to navigation, but this ruling was reversed by the supreme court of the United States holding that the jurisdiction of the general government over interstate commerce and its natural highways places in that government the right to take all necessary measures to preserve the navigability of the navigable watercourses of the country, and that the prohibition against obstructing the navigable capacity of any waters included an obstruction not only in that part of the stream that was navigable, but also anything destroying the navigable capacity of a navigable stream wherever or however done.[86] The preservation of the navigable waters of the United States for the

[86] United States v. Rio Grande Dam & I. Co,, 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. ed. 1136. The case in the lower court is reported in 9 N. Mex. 292, 51 Pac. 674. So far as the question of treaty was involved, Mr. Justice Brewer said: "Neither is it necessary to consider the treaty stipulations between this country and Mexico. It is true that the Rio Grande, for several hundred miles above its mouth, forms the boundary between this country and Mexico, and that the seventh article of the treaty between the United States and Mexico of February 2, 1848 (9 Stats. at Large 928), stipulates that 'the River Gila and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico being agreeably to the fifth article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation. . . . . The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits.' But by the fourth article of the Gadsden treaty of December 30, 1853 (10 Stats. at Large, 1034), it was provided that 'the several provisions, stipulations, and restrictions contained in the seventh article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte, below the initial of the said boundary provided in the first article of this treaty, that is to say, below the intersection of the 31 degree, 47′ 30″ parallel of latitude, with the boundary line established by the late treaty dividing said river from its mouth upwards, according to the fifth article of the treaty of Guadalupe.' And on December 26, 1890, a convention was concluded between the United States and Mexico (26 Stats. at Large, 1512), which provided for an international boundary commission, to which was given, by article five, the power to inquire, upon complaint of the local authorities, whether works were being constructed in the Rio Grande prohibited by any prior treaty stipulations. There is no suggestion in the bill that any action by these commissioners was invoked, although it appears from one of the affidavits that the commission has been

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benefit of its own citizens is a matter of as much concern as any obligation created by treaty or arising from the principles of international law, in favor of other nations or their citizens.

duly constituted. Now it is debated by counsel whether the construction of a dam at the place named in New Mexico, a place wholly within the territorial jurisdiction of the United States, is a violation of any of the treaty stipulations above referred to—they being, primarily at least, limited to that portion of the river which forms the boundary line between the two nations; and also whether the fact that the Rio Grande is partially within the limits of Mexico would give that nation, under the rules of international law, any right to complain of the total appropriation of its waters for the legitimate uses of the people of the United States. Such questions might under some circumstances be interesting and important; but here the Rio Grande, so far as it is a navigable stream, lies as much within the territory of the United States as in that of Mexico, it being, where navigable, the boundary between the two nations, and the middle of the channel being the dividing line. Now, the obligation of the United States to preserve for their own citizens the navigability of its navigable waters is certainly as great as any arising by treaty or international law to other nations or their citizens, and if the proposed dam and appropriation of the waters of the Rio Grande constitute a breach of treaty obligations or of international duty to Mexico, they also constitute an equal injury and wrong to the people of the United States." United States v. Rio Grande Dam & I. Co., 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. ed. 1140.

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CHAPTER XI.

TREATIES OF EXTRADITION AND PROCEEDINGS THEREUNDER.

§ 298. Extradition dependent upon treaty.
§ 299. Extradition included within treaty-making power.
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§ 298. Extradition dependent upon treaty.—In the absence of a treaty, one country is under no obligation to deliver up fugitives from justice to another, although as a matter of comity between nations such deliveries have often been made. "The laws of nations embrace no provision for the surrender of persons who are fugitives from the offended laws of one country to the territory of another. It is only by treaty that such surrender can take place."[1]

In 1834 the British Minister requested the extradition of a person charged with murder in England, but the reply was made

[1] Mr. Rush, Secretary of State, to Mr. Hyde de Neuville, April 9, 1817, MS. Notes to For. Leg., II, 218.

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that where no treaty existed on the subject, the authority of the Executive to exercise an act having such an important effect upon the rights of personal security was more than questionable, and that the case was "without any remedy in the competency of this government to apply."[2] Mr. Webster, while Secretary of State, stated: "Although such extradition is sometimes made, yet, in the absence of treaty stipulations, it is always a matter of comity or courtesy. No government is understood to be bound by the positive law of nations to deliver up criminals, fugitives from justice, who have sought an asylum within its limits,"[3] It is well settled, whatever may be said by writers on international law, that there is no obligation upon the United States to deliver fugitives from justice except as authorized by and in compliance with treaty provisions.[4] "In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision."[5]

[2] Mr. Forsyth, Secretary of State, to Mr. Vaughan, July 7, 1834, MS. Notes to British Leg., VI, 1.

[3] 6 Webster's Works, 399, 405.

[4] United States v. Rauscher, 119 U. S. 407, 17 Sup. Ct. Rep. 234, 30 L. ed. 425; Matter of Metzger, 5 How. (U. S.) 176, 12 L. ed. 104; Matter of Sheazle, Fed. Cas. No. 12,734; 1 Wood. & M. (U. S.) 66; United States v. Watts, 8 Saw. (U. S.) 370, 14 Fed. 130; Ex parte McCabe, 46 Fed. 363, 12 L. R. A. 589; Adriance v. La Grave, 59 N. Y. 110, 17 Am. Rep. 317; Commonwealth v. Hawes, 13 Bush (Ky.), 697, 26 Am. Rep. 242; Commonwealth v. Deacon, 10 Serg. & R. 125; Respublica v. De Longchamps, 1 Dall. (Pa.) 111, 1 L. ed. 59; Sullivan's Case, 1 Op. Atty. Gen. 509; Huggen's Case, 2 Op. Atty. Gen. 452; Case of Two Portuguese Seamen, 2 Op. Atty. Gen. 559; Dewit's Case, 3 Op. Atty. Gen. 661; Wing's Case, 6 Op. Atty. Gen. 431.

[5] Terlinden v. Ames, 184 U. S. 270, 289, 22 Sup. Ct. Rep. 484, 46 L. ed. 534, 545, per Mr. Chief Justice Fuller. Mr. Buchanan, while Secretary of State, said: "But the practice of nations tolerates no right of extradition. Whatever elementary authors may say to the contrary, one nation is not bound to deliver up persons accused of crimes who have escaped into its territories on the demand of another nation against whose laws the alleged crime was committed. The government of the United States has from the very beginning acted on this principle. Mr. Jefferson, when Secretary of State under the administration of General Washington, declared that 'the laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender, coming within our pale, is received by them as an innocent man, and they have authorized no one to seize or deliver him.' It has been contrary to the practice of the United States even to request as a favor that the government of another country should

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§ 299. Extradition included within treaty-making power.—That the power to provide for the extradition of those charged with crime is within the treaty-making power cannot be questioned. "The power to surrender is clearly included within the treaty-making power, and the corresponding power of appointing and receiving ambassadors and other public ministers. Its exercise pertains to public policy and governmental administration is devolved on executive authority, and the warrant of

deliver up a fugitive from criminal justice, because under our laws we possess no power to reciprocate such an act of grace. Since I came into the Department of State the President, after full deliberation with his Cabinet, refused for this reason to prefer such a request to the government of Texas. The truth is, that it has been for a long time well settled, both by the law and practice of nations, that, without a treaty stipulation, one government is not under any obligation to surrender a fugitive from justice to another government for trial." Mr. Buchanan, Secretary of State, to Mr. Wise, September 27, 1845, MS. Inst. Brazil, XV, 119.

In November, 1863, eleven hundred African negroes, whom it was intended to sell as slaves, were captured by an officer of the Spanish army named Don José Augustin Arguelles. He at the time was lieutenant-governor of a district in Cuba, and obtained for his action a large proportion of the prize money allowed to the captors. He subsequently departed for New York, and after he left it was ascertained that a number of the negroes captured had been retained by him and his officers and sold into slavery. The captain-general of Cuba, through the United States consul at Havana, requested his surrender, and when Arguelles reached New York he was arrested and delivered up pursuant to an order of the Executive of the United States to an agent of the captain-general and taken to Cuba. Owing to the celerity with which the seizure and delivery were effected, no opportunity was presented to obtain a writ of *habeas corpus*, but when the news became known condemnatory resolutions were offered in the House of Representatives, but did not pass. In the Senate a resolution was adopted requesting information from the President as to whether the delivery as alleged was made, and if so, under what authority of law or of treaty it was done. The President on June 1, 1864, transmitted a report of the Secretary of State, saying that as there was no treaty in existence, the extradition was made in virtue of the law of nations and the constitution of the United States, and "Although there is a conflict of authorities concerning the expediency of exercising comity toward a foreign government by surrendering, at its request, one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no natural obligation to make such a surrender on a demand therefor, unless it is acknowledged by treaty or by statute law, yet a nation is never bound to furnish asylum to dangerous criminals

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surrender is issued by the Secretary of State as the representative of the President in foreign affairs."[6]

Extradition may be defined as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender."[7] Speaking of the distinction between transportation, extradition and deportation, Mr. Justice Gray said: "Strictly speaking, transportation, extradition and deportation, although each has the effect of removing a person from the country, are different things, and have different purposes. Transportation is by way of punishment of one convicted of an offense against the laws of the country. Extradition is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished. Deportation is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or those of the country to which he is taken."[8]

§ 300. Delivery to the United States as a matter of comity.—There have been several instances in which fugitives have been delivered to the United States in the absence of treaties as a matter of comity. Tweed, after his arrest in Cuba, and before the conclusion of a treaty between the United States and Spain, was delivered to the United States, but Mr. Fish, Secretary of State, declared: "The United States has from time to time carefully avoided making requests for the surrender of criminals for the reason, among others, that it might not be possible to reciprocate in such a matter. The government of Spain, in its

who are offenders against the human race; and it is believed that if in any case the comity could with propriety be practiced, the one which is understood to have called forth the resolution furnished a just occasion for its exercise." Dep. Cor. 1864, pt. 2, pp. 60, 71; pt. 4, p. 35.

[6] Mr. Chief Justice Fuller in Terlinden v. Ames, 184 U. S. 270, 289, 22 Sup. Ct. Rep. 484, 46 L. ed. 534, 545, citing Holmes v. Jennison, 14 Pet. 569, 10 L. ed. 593. See, also, Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. Rep. 195, 46 L. ed. 264.

[7] Terlinden v. Ames, supra.

[8] In Fong Yue Ting v. United States, 149 U. S. 698, 709, 13 Sup. Ct. Rep. 1016, 1020, 37 L. ed. 905.

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action in this case, has appreciated the peculiarity of the case."[9] Mr. Clay, in 1827, applied to the British government for the extradition of a bank-teller charged with robbery.[10] The British government was reminded of the application made by the British Minister to the United States in 1825 for the extradition of one Neilson, charged with forgery in Scotland, which application was favorably recommended to the governor of New York.[11] In 1828 the United States requested from Mexico the extradition of persons of the name of Harden, who, it was charged, had committed a series of murders in Tennessee, and who had fled to Texas and taken refuge there. In accordance with this request, the Mexican government directed that the government of the state of Coahuila and Texas should arrest and surrender the fugitives. The Secretary of War of the United States was requested to detail a part of the military force on the border to assist the agent of the state of Tennessee in taking the fugitives to that state.[12]

§ 301. **No power to reciprocate.**—It may be stated that it is now the settled policy of the United States not to request extradition except pursuant to treaty stipulations, and hence extradition should not be asked as an act of comity merely.[13] Mr. Bayard, in a report to the President, declared: "During the past thirty years this government has repeatedly refused to make a request for extradition in the absence of a treaty, and several notable surrenders of fugitive criminals to the United States, among which may be instanced that of Tweed, have been made without any request on the part of this government. But

[9] November 3, 1876, MS. Inst. Spain, XVIII, 17.

[10] He said in his note to Mr. Tudor, chargé d'affaires: "The application which you are thus instructed to make to the British government is not founded upon strict right, that government being under no obligation by any existing treaty or by the public law to surrender the fugitive. It addresses itself solely to the courtesy and discretion of that government, to its sense of justice, and to the interest common to all nations that notorious offenders should not escape with impunity." Mr. Clay, Secretary of State, to Mr. Tudor, November 23, 1827, MS. Inst. U. S. Ministers, XII, 44.

[11] Governor Clinton, of New York, stated that no sufficient proof had been presented to justify the surrender of Neilson. Governor Clinton to Mr. Clay, December 19, 1825, MS. Misc. Let.

[12] 22 MS. Dom. Let. 275; Am. State Papers For. Rel., VI, 611.

[13] Cushing, 6 Op. Atty. Gen. 85.

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where a treaty of extradition exists, it is believed that the action of the executive branch of the Government has uniformly been guided by the principle that the expression of one thing is the exclusion of another. An agreement between two nations to comply with demands for extradition for certain enumerated offenses implies that surrender will neither be granted nor asked for others not enumerated."[14]

§ 302. Escape effected by means of foreign vessel.—It is not a ground for demanding the return of a fugitive that his escape was effected by foreigners by means of a foreign vessel,[15] as it is probable that the majority of fugitives from justice take this means of escape, nor would the fact that the foreign vessel was a man-of-war make any difference.

§ 303. Asking extradition as a favor.—In 1900 a request was made by the governor of Porto Rico that the United States should demand the extradition from Spain of an individual charged with murder, but Mr. Hay, Secretary of State, declined to comply, because no extradition treaty between the United States and Spain existed, and the United States could not, in the absence of a treaty, surrender under similar circumstances a fugitive from justice.[16] The Mexican law does not permit extradition where

[14] In the case of William J. McGarigle, September 14, 1887, 17 MS. Book, 13.

[15] Mr. Bayard, in his report to the President in the case of McGarigle, September 14, 1887, 17 MS. Rept. Book, 13, said: "The ownership of a vessel, or of the vehicle in which a fugitive criminal escapes, does not appear to have any bearing upon the question of extradition. It is probable that a majority of the fugitive criminals from the United States, who in recent years have found refuge beyond the seas, have escaped on foreign-owned vessels; but this is not known ever to have been made a ground for asking the extradition of a fugitive. Even if the vessel in which the criminal flees should be a foreign man-of-war—a national vessel—this is not regarded as a valid ground for claiming a surrender. On the contrary, this Department, in 1872, as appears by its records, in the case of two seamen of the U. S. S. 'Wachusett,' who were charged with having committed larceny in the city of Leghorn and had escaped to that vessel, approved the action of the commanding officer of the European fleet, in refusing to comply with the request of the Italian authorities for the surrender of the men, the offense with which they were charged not being included in the extradition treaty between the United States and Italy."

[16] Mr. Hay to the Governor of Porto Rico, June 19, 1900, 245 MS. Dom. Let. 649.

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no treaty exists, unless the government seeking it shall promise strict reciprocity. Owing to the inability of the United States to grant extradition in the absence of treaty stipulations, this government does not occupy a position authorizing it to request the surrender of a fugitive by the Mexican government in a case not embraced by the treaty.[17]

Where it was sought to have the United States request extradition from Chile, Mr. Hill, Acting Secretary of State, replied: "It has been deemed impolitic to ask of foreign governments a favor which the government could not grant. This policy has been maintained with few exceptions for a long period of time, and the Secretary of State has directed that it shall be observed in the present case."[18]

[17] Mr. Hay, Secretary of State, to Mr. Graves, December 7, 1899, 241 MS. Dom. Let. 456.

[18] To Mr. Warner, October 6, 1899, 240 MS. Dom. Let. 407. Said Mr. Buchanan, while Secretary of State: "It has been contrary to the practice of the United States even to request, as a favor, that the government of another country should deliver up a fugitive from criminal justice because under our laws we possess no power to reciprocate such an act of grace." Letter to Mr. Wise, September 27, 1845, MS. Inst. Brazil, XV, 119. The extradition of Bill Tucker, alias John Nie, was requested in 1884 from Guatemala, with the explanation that the United States could not promise reciprocity. Mr. Frelinghuysen, Secretary of State, to Mr. Gosling, December 18, 1884, 153 MS. Dom. Let. 459. In 1797 the surrender of persons charged with murder on board of an American vessel, who were in confinement on a French war vessel at Norfolk, Virginia, was requested by Mr. Pickering, Secretary of State, and the fugitives were surrendered. 9 MS. Dom. Let., pp. 411-415. In 1855 Mr. Marcy, Secretary of State, wrote to the Spanish Minister that if he could officially or otherwise request the authorities of the Canary Islands, to which a person charged with crime had fled, "to interpose no unnecessary obstacle to the arrest of Baker and his return to this country, it would be considered as an act of courtesy which would be appreciated and reciprocated." MS. Notes to Spain; Notes from Spanish Leg. In 1878 one Angell, charged with embezzlement, fled to Portugal, and Mr. Evarts, Secretary of State, instructed the American representative at Lisbon that: "It is presumed that the government of his Majesty will have no difficulty in acceding to the prevalent opinion in respect of extradition, that it is a right inherent in the sovereignty of a nation, and not born of specific treaty obligations; while, on the other hand, the right to claim the extradition of a criminal flows exclusively from the reciprocal stipulations of treaty. In this aspect of the question, this government concedes that it may, with perfect propriety, express to that of his most faithful Majesty the great satisfaction which

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§ 304. **Delivery independent of treaty.**—While, as we have seen, the United States is powerless to reciprocate the delivery of fugitives in the absence of treaty, many nations, although not obligated to do so, have voluntarily returned to the United States fugitives from justice. Thus, in 1888, Denmark surrendered John A. Benson, charged with obtaining public lands through fraud practiced on the government, and in 1885 Japan surrendered Calvin Pratt, who was charged with forgery in California.[19] The jurisdiction of the court to try a prisoner for an offense committed within its jurisdiction is not affected by the question whether the act of the governor of the state was illegal in procuring his return from a foreign government with which there is no extradition treaty. The manner in which the accused is brought before the court cannot impair its jurisdiction.[20]

In 1893 President Cleveland, in his annual message to Congress, announced that Costa Rica had, as an act of amity, surren-

it would have in learning that the latter is willing, as an act of international comity, to cause the arrest of Angell, and his surrender to a duly authorized agent of this government to the end that he may be brought to this country, here to stand his trial in due form of law for the offense whereof he stands charged." The fugitive was surrendered, the Portuguese Minister expressing the hope that if his government should have occasion to address a similar requisition to the United States "the same would be received with equal goodwill"; to which the American representative replied that "such application will meet with an equally prompt and effectual response." Portugal made application twice for the surrender of fugitive convicts, but in each instance the reply was returned that in the absence of a treaty, the request could not be complied with. MS. Desp. Portugal. Mr. Frelinghuysen, Secretary of State, to Viscount das Nogueras, February 9, 1883, MS. Notes, Portugal; Mr. Bayard, Secretary of State, to Baron d'Almeirim, June 4, 1888, MS. Notes, Portugal.

[19] 4 Moore Int. L. D. 258; 1 Moore on Extradition, sec. 41, pp. 47-49. In 1817 Sweden and Denmark delivered certain members of an American ship who were charged with murder and piracy. Mexico surrendered Hardin, charged with murder in Tennessee. In 1839 Texas surrendered Cooke, charged with murder in Mississippi. In 1855 Switzerland surrendered Schrock, who was charged with the embezzlement of public funds in Ohio. In 1856 Austria surrendered Morris, who was charged with murder committed on an American vessel on the high seas. In 1864 Cuba surrendered convicts who had escaped from the Tortugas. In 1879 Brazil surrendered Conyngham, who was charged with forgery. See 1 Moore on Extradition, sec. 41, pp. 47-49; 4 Moore Int. L. D. 258.

[20] People v. Pratt, 78 Cal. 345, 20 Pac. 731.

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dered to the United States, upon duly submitted evidence of criminality, a fugitive from justice though no treaty of extradition was in existence.[21] In 1886 Mr. Tree, the Minister of the United States at Brussels, reported to Mr. Bayard, Secretary of State, that the administrator of the Congo had stated in conversation that if the United States should signify its desire for the extradition of a fugitive criminal from the independent state of the Congo, the fugitive, on the presentation of proper proofs, would be arrested and delivered to the American authorities, irrespective of the existence of a treaty of extradition or reciprocal arrangement with the United States.[22]

§ 305. Surrender not in pursuance of treaty.—When it is provided by a treaty that fugitives charged with certain crimes shall be surrendered, the reciprocal duty of surrender does not extend beyond the particular cases for which the treaty has made provision.[23] But each nation has the right to exercise its own discretion in surrendering fugitives from justice in cases not covered by the treaty, and when a fugitive charged with the commission of a crime as to which the treaty is silent is surrendered, the presumption is that the surrender was made in the exercise of the sovereign discretion of the surrendering power, and as an act of comity. Where a defendant has not been surrendered in pursuance of a treaty, the rule that he cannot be tried for any other offense than that named in the extradition proceeding does not apply. If he is surrendered for trial upon a particular indictment referred to in the warrant of arrest for extradition, the fact that such indictment was set aside upon his motion after extradition does not justify a court in discharging him upon *habeas corpus* when he is arrested upon a complaint charging him with the commission of the same offense named in the indictment that was set aside.[24]

[21] For. Rel. 1893, V; 4 Moore Int. L. D. 258.

[22] Mr. Tree to Mr. Bayard, Secretary of State, No. 108, June 12, 1886, For. Rel. 1886, 33; 4 Moore Int. L. D. 258.

[23] United States v. Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425; Commonwealth v. Hawes, 13 Bush, 697, 26 Am. Rep. 242.

[24] Ex parte Foss, 102 Cal. 347, 41 Am. St. Rep. 182, 36 Pac. 669, 25 L. R. A. 593.

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§ 306. **Delivery under immigration acts.**—The laws of the United States that authorize the return of alien convicts to the country to which they belong may, incidentally, have the effect of placing a criminal within the dominion of the authorities of the country from which he made his escape. But such laws do not take the place of treaties of extradition, and do not authorize the Executive to surrender fugitives from justice on the demand of foreign governments.[25]

§ 307. **Territory occupied by United States.**—In 1900 the statute was amended so as to provide for the extradition of persons violating the laws of a foreign territory occupied by the United States or under its control.[26] Under this provision Cuba was held to be foreign territory, although, at the time, the island was under a military government appointed by the President of the United States for the purpose of assisting the inhabitants of that island to form a government of their own.[27]

The Constitution contains certain fundamental guaranties of life, liberty and property relating to the writ of *habeas corpus*, bills of attainder, *ex post facto* laws, and trial by jury for crimes. These, however, have no bearing on crimes committed without the jurisdiction of the United States against the laws of a foreign country.[28]

§ 308. **Treaty measure of right.**—The right to demand extradition depends upon the language of the treaty, and is measured and restricted by the express or implied provisions of the treaty.[29] A foreign government can claim no right to demand the return of a fugitive from justice who has found an asylum in the United States, without a treaty conferring such right.[30] A statute of a state authorizing the governor, in his discretion, to deliver over

[25] 4 Moore Int. L. D. 259; 1 Moore on Extradition, sec. 31; Mr. Frelinghuysen, Secretary of State, to Mr. Willamov, November 14, 1882, MS. Notes to Russia, VII, 403.

[26] See act of June 6, 1900, amending Rev. Stats., sec. 5270.

[27] Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. Rep. 302, 45 L. ed. 448.

[28] Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. Rep. 302, 45 L. ed. 448.

[29] Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 26 Am. Rep. 242.

[30] Ex parte Dos Santos, Fed. Cas. No. 4016, 2 Brock. 493. But see as to the law of nations in the absence of a treaty, In re Washburn, 3 Wheel. C. C. 473; In re Sheazle, Fed. Cas. No. 12,734, 1 Wood. & M. 66.

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to justice any person found in the state who is charged with a crime committed out of the jurisdiction of the United States is unconstitutional.[31] Courts are not obligated by the principles of international law alone without a treaty or statute to remand prisoners for trial to a foreign government.[32] Under a treaty providing that "neither of the contracting parties shall be bound to deliver up its own citizens, under the stipulations of this treaty," a citizen of the United States charged with a murder committed in one of the states of Mexico will not be surrendered.[33] The right of foreign nations to demand the surrender of fugitives from justice aside from treaty stipulations has never been recognized by the United States.[34]

§ 309. **Crime committed within jurisdiction.**—The treaties of extradition provide usually for the surrender of a person found in the territory of one of the contracting powers for an offense committed within the jurisdiction of the other. And it should appear that the crime was committed within the jurisdiction of the government demanding jurisdiction.[35] Jurisdiction is held to be convertible with the term "country."[36] An offense com-

[31] In re Vogt, 50 N. Y. 321; S. C. 44 How. Pr. 171.

[32] United States v. Davis, Fed. Cas. No. 14,932, 2 Sum. 482. It was held that the treaty with France, respecting the surrender of fugitives from justice could not be executed by the President of the United States in the absence of legislation. In re Metzger, 1 Park. Cr. Rep. 108.

[33] Ex parte McCabe, 46 Fed. 363, 12 L. R. A. 589. In this case the authorities are reviewed at length and the court said: "If there were no pre-existing obligation to extradite a fugitive, the obligation must necessarily grow out of either statute law or treaty engagement. It is, therefore, apparent that the purpose of the treaty was to authorize the parties to do something which they had no previous authority to do. The parties came together through their respective representatives, and made an agreement—an obligatory, binding agreement—to surrender, under certain circumstances, persons who commit crimes and flee from offended justice. They are authorized to act as they bind themselves. The agreement is mutual; the rights and obligations reciprocal. If power to surrender be not affirmatively given, the right to demand a fugitive can have no existence. The right to demand implies *ex vi termini*, the corresponding authority and obligation to surrender. But both to exist should be founded upon express stipulations."

[34] In re Fetter, 23 N. J. L. (3 Zab.) 311, 57 Am. Dec. 382.

[35] Cushing, Atty. Gen. 1856, 8 Op. 215.

[36] Williams, Atty. Gen., 14 Op. 281. The court had held otherwise. In re Stupp, 11 Blatchf. 124, Fed. Cas. No. 13,562.

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mitted on board of a public ship of war on the high seas is committed within the jurisdiction of the nation to whom the ship belongs.[37]

When the Russian Minister expressed a desire that a proposed treaty of extradition should provide for the extradition of persons charged with the commission of crimes against the laws of either country committed outside of its territorial jurisdiction, Mr. Fish, Secretary of State, said: "This cannot be conceded. It is at once repugnant to the policy of this Government and to the criminal jurisprudence of the United States, and in effect would render the municipal law of one country operative within the territorial sovereignty of another independent sovereign power. By the Constitution of the United States an accused party is entitled to trial within the state and district wherein the crime shall have been committed; no offender can be tried in the United States for an offense committed without its jurisdiction."[38]

§ 310. **Crime not complete in one country.**—But a person who is charged with poisoning, resulting in death, in Canada, may be extradited to Canada, although it may appear that the poison, if given at all, was administered in the United States.[39]

A British subject, charged with the commission of murder on board of a British steamship, on which he was a seaman, while the vessel was lying at a Cuban port, was brought on the regular voyage of the steamer to New York. The authorities of Cuba had refused to entertain jurisdiction of the offense on the ground that it was committed on board of a British vessel by a British subject. On his landing in New York the British government demanded his extradition, which was granted.[40] But where the United States, in 1891, requested of Great Britain the arrest of a person who had escaped from a jail at Constantinople and was supposed to be on his way from New York to England, it was replied that the British government had no power to arrest the

[37] President Adams to Mr. Pickering, Secretary of State, May 21, 1799; 8 John Adams' Works, 651; 1 Moore on Extradition, 135; Wharton's State Trials, 392.

[38] Mr. Fish, Secretary of State, to Mr. Jewell, May 9, 1874, MS. Inst. Russia, XV, 426.

[39] Sternaman v. Peck, 83 Fed. 690, 28 C. C. A. 377.

[40] 1 Moore on Extradition, 138.

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fugitive in respect of his escape from the Constantinople prison.[41] It was held, under the treaty between the United States and Great Britain of 1899, providing for the extradition of persons charged with crimes committed within the jurisdiction of either nation, that extradition will not be granted from the United States of a person charged with the commission of an offense prior to the proclamation of Lord Roberts in 1900, declaring that the South African Republic was a British colony.[42] The "Bennington," a war vessel of the United States, in 1894 arrived off the Golden Gate, having on board a number of citizens of Salvador, to whom an asylum had been granted, and she remained outside until the 23d of August. Instructions having been received from the Navy Department, she came inside the harbor, when a United States marshal served warrants on them on charges of crime preferred under the extradition treaty between Salvador and the United States. When the prisoners were brought before the federal district court, a plea was interposed to the court's jurisdiction on the ground that they were brought by the government of the United States forcibly and against their will, and hence were not, within the meaning of the treaty, fugitives from justice, but the court overruled the plea.[43] It was said by Mr. Hay, Secretary of State, that while a conspiracy formed within the United States to commit a crime abroad may be punishable in the United States, the authorities of the government within whose territory the conspiracy was to be effectuated could not obtain the extradition of the persons concerned in the conspiracy.[44]

§ 311. **Irregularities in extradition.**—A person who has been brought from a foreign country by proceedings which violate a treaty between that country and the United States, and which are forbidden by that treaty, may raise the question by a plea to an indictment in a state court, and if the right asserted by the plea is denied, the supreme court of the United States can review

[41] Mr. Lincoln, Minister to England, to Mr. Blaine, Secretary of State, No. 485, June 30, 1891, 168 MS. Desp. from England.

[42] In re Taylor, 118 Fed. 196.

[43] The Salvadorean Refugees, Am. Law Rev., Jan.-Feb., 1895; 4 Moore Int. L. Dig. 286.

[44] Mr. Hay, Secretary of State, to Baron Fava, Italian Ambassador, No. 654, March 8, 1901, MS. Notes to Ital. Leg., IX, 508.

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the judgment of the state court.[45] To enable the supreme court of the United States, however, to review the judgment, the right claimed must be under the Constitution, laws or treaties of the United States. If a prisoner has been kidnaped in a foreign country and brought by force against his will within the jurisdiction of the state, the law of which he is charged with violating, without attempting to proceed under the extradition treaty, although one exists, the supreme court of the United States is powerless to grant relief.[46] The manner in which the accused is brought before a state court does not impair its jurisdiction. Therefore, it is no objection to the trial and detention of a prisoner that he has been forcibly abducted from another state, and conveyed within the jurisdiction of the court detaining him.[47] Where a person is held under process legally issued from the courts of a state, the supreme court of the United States will not interfere to relieve him, although he may have been arrested and taken by violence from the territory of one state to that of another.[48]

§ 312. Indictment and trial valid.—The courts have refused to discharge a prisoner returned from another state by means of false affidavits,[49] and the state courts have frequently declined to order the discharge of a prisoner kidnaped and taken from another state;[50] in other words, it may be stated that the indictment and trial may be valid although the original arrest was illegally made.[51] A fugitive from justice is not guaranteed by the treaties of extradition an asylum, and such treaties do not give him any greater or more sacred right than he possessed before. Their object is to provide that for certain crimes he shall be deprived of that asylum and surrendered to justice, and they prescribe the manner of accomplishing this object.[52]

[45] Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. Rep. 225, 30 L. ed. 421.

[46] Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. Rep. 225, 30 L. ed. 421.

[47] Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. Rep. 43, 36 L. ed. 934.

[48] Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. Rep. 40, 36 L. ed. 934.

[49] In re Moore, 75 Fed. 824.

[50] Kingen v. Kelly, 3 Wyo. 577, 28 Pac. 40, 15 L. R. A. 193; Baker v. State, 88 Wis. 147, 59 N. W. 572.

[51] In re Johnson, 167 U. S. 126, 17 Sup. Ct. Rep. 735, 42 L. ed. 105.

[52] Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. Rep. 225, 30 L. ed. 421. The federal courts have jurisdiction of extradition proceedings under treaty. In re Ezeta, 62 Fed. 967. A prisoner convicted of a nonextradit-

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§ 313. Action by the government.—But the government in which the arrest is made may have a cause for complaint. In 1891 Rufino Rueda was arrested at Key West, for the purpose of extradition, on a charge of murder committed in Havana. On the night of his arrest he was taken by Spanish agents, placed on board of a vessel, and taken to Havana. The United States demanded his return to American jurisdiction, subject to such extradition process as the government of Spain might, under the treaty, subsequently institute, and in compliance with this demand the Spanish government caused the return of the prisoner to Key West.[53]

A nation that claims a fugitive from justice has not the right to invade the territorial waters of another state for the purpose of causing the arrest of such fugitive.[54] In 1892 a boy, fifteen years of age, a citizen of Canada, was kidnaped in New York and enticed across the boundary into Canada. The British government voluntarily agreed to return him to the place in New York from which he had been abducted.[55]

In 1863 two Canadian constables abducted two persons, Wilson and McElvery, from Michigan, and Mr. Seward, Secretary of State, complained of the abduction. The governor-general of Canada disavowed the action of the officers, and expressed regret for the occurrence, and offered to restore immediately the abducted persons should the United States so require. It appeared that the persons abducted had violated the laws of Canada, and

able offense will be refused a discharge after a voluntary return. In re Cross, 43 Fed. 520. An extradited prisoner claiming not to be a fugitive was refused a discharge. Eaton v. West Virginia, 91 Fed. 766, 61 U. S. App. 676, 34 C. C. A. 68. The abduction of a prisoner will not prevent his trial and conviction. Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. Rep. 1204, 32 L. ed. 283; State v. Brewster, 7 Vt. 118; People v. Rowe, 4 Park. Cr. Rep. 253; State v. Ross, 21 Iowa, 467. But see contra, State v. Simmons, 39 Kan. 262, 18 Pac. 177. Where a prisoner was discharged on the principle of comity between states, see Com. v. Shaw (Pa.), 6 Crim. L. Mag. 245. As to extradition effected by false affidavit authorizing a discharge on *habeas corpus* after conviction, see State v. Jackson, 36 Fed. 258, 1 L. R. A. 370.

[53] MS. Inst. Spain, XXI, 54, 65; Dispatch No. 216, March 5, 1892, from the American legation at Madrid, 124 MS. Desp. from Spain.

[54] MS. Inst. Brazil, XV, 119, Mr. Buchanan, Secretary of State, to Mr. Wise, September 27, 1845.

[55] 4 Moore Int. Law Dig., p. 330.

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had fled to Michigan. Under the circumstances, Mr. Seward stated that he would not insist on their liberation or restoration, but would remit them to the penalties which had been adjudged against them by the laws of the country whose laws had been violated by them.[56]

Mr. F. Webster, Acting Secretary of State, in a note addressed in 1841 to Mr. Fox, the British Minister, stated that a party of British soldiers had entered a house in Vermont and carried off one Grogan to Canada, and expressed the opinion, if the facts should appear to be as alleged, that the British government would liberate the prisoner and punish the offenders. Mr. Fox, in response, stated that before the receipt of any official communication, but upon the receipt of a report of the matter, the British government had ordered the release of Grogan and his restoration to the state of Vermont, should there appear to be confirmation of the reported illegality of his arrest. Grogan, after an investigation of the case, was ordered released, and was conducted by a sheriff to a place in Vermont, as near the place of his abduction as it was possible to ascertain.[57]

Other instances have occurred which have become the subjects of diplomatic correspondence between the United States and other governments, when persons have been taken from one country to another, and in which the restoration of the rescued prisoner has been demanded.

§ 314. Criminal by the law of both countries.—It is not necessary, to make an offense criminal by the laws of both countries, that there should be absolute identity in the statutes defining the offense. Taking, for instance, the treaty with Great Britain, we find that extradition shall be effected only "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found,

[56] Mr. Seward, Secretary of State, to Lord Lyons, British Minister, June 6, 1863, MS. Notes to Great Britain, X, 67. Several cases have occurred in some of which demand for return of kidnaped prisoners was made by the United States and in others demand was made upon the United States.

[57] F. Webster, Acting Secretary of State, to Mr. Fox, September 28, 1841; Mr. Fox to Mr. Webster, October 21, and November 26, 1841; Mr. Webster, Secretary of State, to Mr. Fox, November 27, 1841, MS. Dep. of State.

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would justify his apprehension and commitment for trial, if the crime or offense had there been committed."[58] But under this provision of the treaty it is sufficient if the essential character of the transaction constituting the offense is the same, and the statutes of each country make it criminal.[59]

§ 315. Bonds and coupons.—Where copies of bonds and coupons were innocently made by engravers for the use of corporations as samples, and were never delivered to the corporations, they are not forged instruments so long as they are innocently retained by the engravers or others to whom they are delivered. But they become forgeries when they are fraudulenly uttered as genuine, even if they are not altered.[60]

§ 316. Common-law crimes.—Under the treaty with Mexico it was held that a person may be extradited from the United States to Mexico for the crime of forgery of an instrument which the laws of Mexico make an offense, the Mexican authorities having held him for the offense. It was contended that the real definition of forgery was to be found in the common law of England, and that although the transaction complained of might have been a cheat, it was not a forgery within the meaning of the treaty. But the court answered that the common law of England could hardly be said to be the only criterion by which to construe the language of a treaty, and that Mexico could not be supposed to have the common law exclusively in mind as governing the true construction of a treaty between it and this country, neither of which owed any allegiance to England. The court further said there were no common-law crimes of the United States, and that it could not be said that the Mexican authorities intended to be bound by any very restricted use of the word "forgery" "when the question concerned an offense of that character committed in Mexico. It is for an offense against Mexican law that the prisoner is held to answer."[61]

[58] Treaty of 1842, art. 10, 8 Stats. at Large, 572, 576.

[59] Wright v. Henkel, 190 U. S. 59, 23 Sup. Ct. Rep. 785, 47 L. ed. 954; In re Wright, 123 Fed. 463.

[60] In re Count de Toulouse Lautrec, 102 Fed. 878, 43 C. C. A. 42.

[61] Benson v. McMahon, 127 U. S. 457, 8 Sup. Ct. Rep. 1240, 32 L. ed. 234.

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§ 317. **Embezzling public moneys.**—It was provided by the treaty of December 11, 1861, between the United States and Mexico that extradition might be had of a person charged with the crime of "the embezzlement of public moneys." Where moneys were collected as tolls and wharfage, they became the property of the state as soon as they were collected, and to constitute them public moneys it was not necessary that they should be first paid into the treasury. For such an embezzlement, extradition of the person charged can be secured under the treaty.[62] The funds of a private corporation, however, cannot be considered public moneys within the meaning of the treaty.[63] But where a cashier of a savings bank owned by a city in Germany embezzles its funds, he being a public official appointed by the city, the crime is an embezzlement of public moneys within the meaning of that term in the treaty of 1852 between Prussia and the United States.[64]

The Penal Code of Cuba provides that a public employee who shall take public funds of which he has charge by virtue of his office shall be guilty of a crime. If such an officer falsely certifies to invoices in which coupons are inclosed, and obtains possession of money, which could not, except in consequence of his official act, pass from the possession of the bank to his own, he is guilty of an extraditable offense.[65] If it appears from the extradition papers that the person charged received checks for money due a municipality, and deposited them in bank to the credit of the corporation, but that he accounted for only a portion, sufficient proof is presented to warrant his delivery. Whether the amount unaccounted for, as appeared from the evidence, was greater or less than the amount charged is, in such a case, immaterial.[66]

§ 318. **Law of the place.**—In applying in particular cases the definitions of crimes named in a treaty, the jurisdiction and legislation of the particular places of arrest will be determining factors.[67] Where a murder is committed on the high seas, on board

[62] People v. Gray, 66 Cal. 271, 5 Pac. 240.

[63] Blandford v. State, 10 Tex. App. 627.

[64] In re Reiner, 122 Fed. 110.

[65] In re Cortes, 42 Fed. 47; affirmed, Oteiza v. Jacobs, 136 U. S. 330, 10 Sup. Ct. Rep. 1031, 34 L. ed. 464.

[66] In re Breen, 73 Fed. 458.

[67] In re Muller, Fed. Cas. No. 9913.

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of a British war vessel, it, within the meaning of the treaty of extradition of 1794, was within the jurisdiction of Great Britain, and the government of the United States, should the accused be found in the country, is compelled to surrender him.[68] Forgery, as defined and recognized by the courts of England, does not include the making of false entries in the usual books of account, or memoranda on slips directing such entries by others, made by an officer or employee of a bank, for the purpose of concealing embezzlements made by him. A person will be discharged on *habeas corpus* where he is held to extradition for forgery and the only proof consists of such acts committed in England.[69]

§ 319. **Laws of the place of refuge.**—Under a treaty between the United States and France, it was provided that the laws of the place of refuge were to be applied to the investigation, as if the crimes had been committed at the place of arrest, but it was held that on the question whether an extraditable offense had been committed or not, the laws of France, and not those of the United States, should form the basis of inquiry.[70]

The term "forgery," as used in the treaty between Austria-Hungary and the United States, includes the crime of uttering forged papers.[71] The third article of the treaty between the United States and Salvador, in defining murder, states that it comprehends "the crimes designated in the penal codes of the contracting parties by the terms 'homicide,' 'patricide,' 'assassination,' 'poisoning' and 'infanticide.'" The Penal Code of San Salvador defines murder as homicide "committed with premeditation and under one of the following circumstances: (1) With perfidy or a breach of trust; (2) for a price or promise of reward; (3) by means of flood, fire or poison. The crime of murder will be punished with the penalty of death." The same code defines homicide as the killing of another "with premedita-

[68] United States v. Robbins, Fed. Cas. No. 16,175; United States v. Cooper, Whart. St. Tr. 659, Fed. Cas. No. 14,865.

[69] In re Tully, 20 Fed. 812.

[70] In re Metzger, Fed. Cas. No. 9511. Under the treaty with Switzerland, a crime subject to infamous punishment in that country is a crime for which extradition may be had, although the crime is not subject to such punishment in the United States. In re Farez, Fed. Cas. No. 4645, 7 Blatchf. 345. See as to murder and manslaughter, In re Kelley, Fed. Cas. No. 7655, 2 Low. 339; In re Palmer, Fed. Cas. No. 10,679.

[71] In re Adult, 55 Fed. 376.

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tion, and without any of the circumstances enumerated in the preceding article, or under some one of said circumstances, and without premeditation." The penalty for homicide is punishment at hard labor. It was held that homicide as thus defined constituted murder within the meaning of the treaty.[72] But where a person was killed in Salvador by the President and his officer under the jurisdiction of the military law of that country, the offense is not extraditable.[73]

§ 320. **Forgery in the third degree.**—The Mexican government held that the making of original false entries in books of account, constituting forgery in the third degree under the law of Missouri, did not constitute forgery within the meaning of the treaty which in the Spanish text employed the word "falsificacion."[74] But where a treaty uses general terms, such as "murder" or "arson," it does not follow that their meaning is to be interpreted solely by the common law, but they may be interpreted according to the law of the two countries as it exists when extradition is sought.[75]

[72] In re Ezeta, 62 Fed. 972.

[73] In re Ezeta, 62 Fed. 972.

[74] Mr. Foster, Secretary of State, to Mr. Ryan, Minister to Mexico, No. 837, October 17, 1902, MS. Inst. Mexico, XXIII, 288.

[75] Cohn v. Jones, 100 Fed. 639. A case came before the United States circuit court for the northern district of California on a petition for a writ of *habeas corpus*, where, among other questions, the point was urged that under the treaty with Japan forgery was not committed where a signature was obtained to a paper by fraud. It appeared that a mercantile firm in Japan had been in the habit of furnishing military machinery and supplies to a Japanese arsenal, and for several years had employed the accused to receive the supplies and to verify the statements furnished, while all the pecuniary transactions were attended to by a member of the firm, which had been in the habit of furnishing their statements and invoices in French. The accused, however, stated to the managing partner that it would be more convenient for those in charge of the arsenal if the invoices should in the future be made out in Japanese, and to such procedure consent was given. The accused presented to the managing partner, written entirely in Japanese, what purported to be an invoice, but which in reality was a receipt on which the accused collected money. It was contended on one side that this constituted forgery, because the accused had made his employer his unconscious agent in completing the document; while, on the other, it was urged that the act constituted either embezzlement or obtaining money by false pretenses, offenses not extraditable. Another charge was also made against the prisoner of al-

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§ 321. **Retroactive effect of treaties.**—An extradition treaty is not in the nature of an *ex post facto* law within the meaning of the Constitution, and hence, unless a clause is inserted to the contrary, it will cover offenses committed prior to its ratification.[76] An extradition treaty was concluded February 22, 1899, between the United States and Mexico, which provided in its eighteenth article that it "shall take effect from the date of exchange of ratifications, but its provisions shall be applied to all cases of crimes or offenses enumerated in article II which may have been committed since the twenty-fourth day of January, 1899." Mr. Hay, Secretary of State, in a note to the Mexican Ambassador, stated that while the Department of State did not deem the question entirely free from doubt, it had reached the conclusion that in view of the stipulations contained in the eighteenth article, the treaty did not authorize extradition for offenses committed prior to January 24, 1899.[77] In his annual message of December 7, 1903, President Roosevelt said: "Steps have been taken by the State Department looking to the making of bribery an extraditable offense with foreign powers. The need of more effective treaties covering this crime is manifest."[78]

Charles Kratz, charged with the commission of bribery in Missouri, fled to Mexico, and in October, 1903, the United States asked for his extradition, although at the time when the offense was committed the crime was not included in the treaty of extradition between the United States and Mexico, but was embraced in a supplemental convention, which subsequently became operative. The law of Mexico of 1897 authorized extradition to be granted where there was no treaty covering the subject, on the promise that reciprocity would be made. The United States, basing its action on the latter convention, made a promise of reciprocity, saying that according to the decision of the federal courts, an extradition treaty has, in the United States, a retro-

tering the figures in an instrument, so that the first question became involved in the second, and practically was not necessary to be decided. The writ of *habeas corpus* was denied and the prisoner remanded. In re Oyama Kenichi, No. 12,579, decided April 8, 1898.

[76] In re Giacomo, Fed. Cas. No. 3747, 12 Blatchf. 391. This is the general rule. Twiss' Law of Nations, ed. 1884, 411.

[77] July 11, 1899, MS. Notes to Mexican Leg., X, 469, No. 17.

[78] For. Rel. 1903, XV.

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active operation, where no express stipulation to the contrary exists, and accordingly the extradition of Kratz was, after examination, effected.[79]

§ 322. **Special stipulation as to time of taking effect.**—If, however, a treaty expressly provides that it shall not apply to crimes committed anterior to its date, and it specifies no date when it shall take effect, the date of its conclusion will be deemed the date on which it becomes effective.[80] But where the treaty declares that it shall not apply to offenses committed prior to its date, and that it shall take effect twenty days after the exchange of ratification, the treaty will apply to an offense committed the day after the exchange of ratifications, as the reference to the date of the treaty was either the date of the signing or the date of the exchange of ratifications, and not the time when it should take effect.[81] A statute of a state making an act a crime, enacted after the date of a treaty, will sustain an application for extradition, where the statute was in force at the time when the offense was committed and when the application was heard.[82]

§ 323. **Extradition of citizens.**—In many of the extradition treaties it is expressly provided that neither of the contracting powers shall be obliged to deliver up its own citizens. But it is not necessary for the government seeking extradition to allege or prove that the fugitive is not a citizen of the demanding government. Citizenship is a matter of defense.[83] But the United States "is ever ready to annul or to narrow the exemptions contained in its extradition treaties based on the citizenship of the fugitive."[84] Citizenship is not conferred by a declaration of intention to become a citizen.[85] Where a different mode of trial

[79] For. Rel. 1903, 674.

[80] Matter of Metzger, 5 N. Y. Leg. Obs. 83.

[81] In re Vandervelpen, Fed. Cas. No. 16,844, 14 Blatchf. 137. In this case the treaty was between the United States and Belgium, and the date of the signing of the treaty was March 19, 1874. The exchange of ratifications was effected on April 30, 1874, and the crime for which extradition was sought was committed in Belgium on May 1, 1874.

[82] In re Muller, Fed. Cas. No. 9913.

[83] Mr. Gresham, Secretary of State, to the Attorney General, May 22, 1893, 192 MS. Dom. Let. 82.

[84] Mr. Olney, Secretary of State, to Mr. Ransom, Minister to Mexico, December 13, 1895, For. Rel. 1895, II, 1008, 1009.

[85] Mr. Olney, Secretary of State, to Mr. Tounsend, November 13, 1896, 213 MS. Dom. Let. 680, in the case of Antonio Vizcarra.

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is not prescribed by the treaty, an American citizen who is charged with crime in a foreign country cannot complain if he is forced to yield to such modes of trial and punishment as the laws of such country provide for its own people.[86] Yet a government may refuse to subject its citizens to forms of trial unknown to its laws and abhorrent to its government and people.[87]

The treaty concluded between the United States and the Argentine Republic, September 26, 1896, provided that in no case should the nationality of the accused be an impediment to his extradition, but the Senate of the United States, January 28, 1898, amended the treaty by adding the clause, "but neither government shall be bound to deliver its own citizens for extradition under this convention; but either shall have power to deliver them up, if, in its discretion, it be deemed proper to do so." This amendment was inserted in the treaty as ratified and proclaimed by the two governments.[88]

§ 324. **Treaty provisions.**—The Italian penal code forbids the extradition of Italian subjects. The United States, in 1890, demanded the extradition of two Italians, who had committed murder in the United States and had fled to Italy. The Italian government refused to surrender, but they were arraigned under the Italian law for crimes committed in the United States and were convicted.[89] Mr. Blaine contended in the diplomatic cor-

[86] Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. Rep. 302, 45 L. ed. 448.

[87] Mr. Fish, Secretary of State, to Mr. Jewell, May 9, 1874, MS. Inst. Russia, XV, 426.

[88] Mr. Day, Secretary of State, to Mr. Viso, May 26, 1898, MS. Notes to Argentine Leg., VII, 29.

[89] One received a sentence of twenty years' imprisonment and the other of fifteen years. Mr. Gresham, Secretary of State, to the governor of Pennsylvania, January 31, 1894, 195 MS. Dom. Let. 329.

Mr. Blaine, Secretary of State, in his note to the Italian Minister, Baron Fava, of June 23, 1890, expressed the views on the subject entertained by the government of the United States. He said: "I have had the honor to receive your note of the 20th of April last, in relation to the cases of the two Italian subjects, Bevivino and Villella, who, having committed murders in the United States of a most aggravated and atrocious character, have sought asylum in their own country, which has refused to comply with the demand of this government, based upon treaty, for their extradition. The immediate occasion of your note was the reply made by me to your request for the execution in this country of letters rogatory issued by a court in Italy, before which the two fugitives have been arraigned for trial, under Italian law, for the crimes committed in the United States.

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respondence on the subject that citizens were not exempted from surrender by international law, and that it had been well understood when dealing with the United States that "citizens" were

In that reply I stated that, with a view to preventing, if possible, the total defeat of the ends of justice in the cases in question, I would forward the letter to the governors of the States of Pennsylvania and New York for such action as they might find it proper to take, the letters being respectively addressed to the authorities in those States. At the same time I took occasion to reserve what I regarded as the clear right of the Government of the United States, under the treaty with Italy, to require the delivery of the fugitives for trial in this country.

"In answer to this you remind me that this question has been discussed at length and entirely settled by the royal ministry of foreign affairs and the United States legation at Rome; that Mr. Stallo, lately the minister of the United States to Italy, must have informed this Department that, according to Italian law, no citizen can be removed from the jurisdiction of his natural judges, the judges of his own country; and that, although an exception is made to this principle when a citizen who has committed a crime in a foreign country is there arrested, it nevertheless resumes its force when he returns to his own country. You also state that the new Italian penal code expressly forbids the extradition of Italian subjects, and declare that this principle now forms a part of public law, which the United States has recognized in many of its treaties. . . . .

"You are correct in your supposition that Mr. Stallo informed the Department of the provisions of Italian law on the subject, but the Department is surprised to learn that the Government of Italy entertains the impression that the question was settled by the royal ministry of foreign affairs and the United States legation at Rome. In various interviews with the royal ministry of foreign affairs reported by him to the Department, as well as in formal communications addressed to that ministry, Mr. Stallo protested against the position of the Italian Government; and the Department is not informed of anything said or written by him that savored of acquiescence. . . . .

"In order to understand the present controversy, it is necessary to revert to its origin. It did not arise in the cases of Villella and Bevivino, but in that of Salvatore Paladini, whose extradition Mr. Stallo, on May 17, 1888, demanded of the Italian Government on a charge of passing counterfeit money of the United States, for which Paladini was under indictment in the district court of the United States for the district of New Jersey. . . . . On October 25, Mr. Crispi, more than 5 months after the original demand, announced that, according to the Italian procedure, the minister of grace and justice had submitted the demand to the successive examination of the criminal section of the court of appeals of Messina, of the council of state, and of the council of ministers, and that they were unanimously of opinion that Paladini should not be extradited, for the reason that he was an Italian subject. This opinion, he said, was based upon certain principles, which he stated. It is unnecessary to recount them, since they are the same,

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embraced by the general term "persons," and unless they were expressly exempted by the language of the treaty, they should be extradited when a proper application was made for that pur-

in almost the same language, as those set forth in your note.

"In January, 1899, the Department received from Governor Beaver, of Pennsylvania, information that two Italians, named Vincenzo Villella and Giuseppe Bevivino, charged with the commission of atrocious murders in Luzerne County, Pa., had taken refuge in Italy. The Department at once telegraphed information of the facts to the legation at Rome. Mr. Stallo saw the minister of foreign affairs, and, laying the facts before him, was assured that measures would at once be taken for the arrest of the accused and for their eventual trial in Italy as soon as he could give their names, which he was at that time unable to do, owing to a confusion in the telegrams.

"On January 30, 1889, Governor Beaver made a formal request that the extradition of the fugitives be demanded. He had been informed of the attitude of the Italian Government in the case of Paladini, but because of the importance of inflicting punishment upon the criminals in Pennsylvania, and influenced by an opinion which, he had been informed, had been expressed by the Italian consul at Philadelphia to the effect that the fugitives would be given up, he asked the Department to endeavor to obtain their surrender. A President's warrant was accordingly issued to John R. Saville and Frank P. Dimaio, the persons designated by Governor Beaver to receive the fugitives, and Mr. Stallo was so informed. These agents, Mr. Stallo was also informed, would take with them authentic proof of the guilt of the fugitives, and upon arriving in Italy would proceed at once to Rome to consult with him. Meanwhile he was to ascertain whether the extradition of the fugitives could be obtained, and to apply to the Italian Government for that purpose.

"On February 20, Mr. Stallo acknowledged the receipt of the papers, which he transmitted to the foreign office, with an application for the fugitive's surrender, coupled with an expression of the earnest desire of the United States that the determination in the Paladini case should be reconsidered. Mr. Stallo also called attention to the fact that the principal witness against the two fugitives was their accomplice, Michele Rizzolo, who was under arrest at Wilkes-Barre, in Pennsylvania, and had made a full confession, and that it was impracticable to bring this witness, either before or after his trial, to Italy in order to testify before an Italian court.

"On the 7th of March, Mr. Stallo enclosed to the Department a note from Mr. Crispi, bearing date of the preceding day, in which the surrender of the fugitives was refused. The reasons given were the same as those stated in the case of Paladini.

"It was in view of the total divergence of opinion between this Government and that of His Majesty, developed in the preceding correspondence, that I deemed it necessary to make the reservation contained in my note of the 21st of March last. I shall now endeavor to show that that reservation was not only justified, but also required, by the circumstances.

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pose. The chief purpose of entering into extradition treaties, he said, was to assure the punishment of the criminal at the place where the crime was committed.

"I do not understand the Italian Government to deny that the provisions of the treaty of 1868, if not obstructed by any municipal statute or qualified by any principle of international law, would oblige the contracting parties to deliver up their citizens. Indeed, I assume this to be admitted. The treaty says that the two governments mutually agree to deliver up 'persons who, having been convicted of or charged with the crime specified in the following article committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other.' As the term 'persons' comprehends citizens, and as the treaty contains no qualification of that term, it is unnecessary to argue that the treaty standing alone would require the extradition by the contracting parties of their citizens or subjects.

"I shall also assume it to be admitted by the Italian Government that the parties to a treaty are not permitted to abridge their duty under it by a municipal statute. It is true that the authorities of a country may, by reason of such a statute, find themselves deprived of the power to execute a treaty. But if, in obeying the statute, they violate or refuse to fulfill the treaty, the other party may justly complain that its rights are disregarded and may treat the convention as at an end. Hence, in appealing to its statutes to justify its action in the present case, I understand the position of the Italian Government to be that those statutes are merely declaratory of the law by which nations are bound to be governed in their dealings one with another.

"We are brought, therefore, to the consideration of the question whether the refusal of the Italian Government to deliver up Paladini, Villella, and Bevivino, under the treaty of 1868, is justified by the principles of international law. The answer to be given to this question must be decisive of the matter.

"It is stated—and the statement has the sanction of the eminent Italian publicist, Fiore—that the refusal to surrender citizens had its origin in the practice of extradition by France and the Low Countries in the eighteenth century. Formerly such an exception was not recognized. Even the Romans, who were not wanting in a disposition to assert their imperial prerogatives, did not refuse to deliver up their citizens, their feciales being invested, in respect to states in alliance with Rome, with authority to investigate complaints against Roman citizens and to surrender them to justice if the complaints were found to be well grounded. The exception of their citizens by France and the Low Countries originated in the following manner:

"The two countries practiced extradition, not under a convention, but under independent declarations of a general character. By the Brabantine Bull, issued by the German Emperor in the fourteenth century, subjects of the Duke of Brabant enjoyed the privilege of not being withdrawn from his jurisdiction. A similar privilege was gradually extended by law and usage to other subjects of the House of Austria, while the Low

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§ 325. Position of the United States.—In 1894 the Minister of Italy submitted a draft of a supplementary extradition treaty, providing that neither party should be obliged to surrender its

Countries were still under its dominion. In consequence of the establishment of this rule, the Low Countries refused to deliver up their subjects, and France, as an act of retaliation, refused to surrender Frenchmen. Thus, not in recognition of any principle, but merely with a view to observe a strict reciprocity, was the precedent first established.

"That the example thus set has generally been followed by European states is not to be questioned; for, with the single exception of England, it is believed that they have adopted the rule of refusing to deliver up their citizens. But, in order to determine the force and effect of this rule from the point of view of international law, it is necessary to inquire how it has been secured and enforced. Where no treaty exists, the subject is simple. It is generally agreed that, in the absence of a convention extradition is a matter of comity, and not of positive obligation. In such case, each nation is free to regulate its conduct according to its own discretion. If it declines to surrender its citizens, its action, though detrimental to the interests of justice, does not afford ground for complaint or pressure, since it is acting within its right. But, where the subject is regulated by treaty, the case is different. What before was a matter of comity and discretion, becomes a matter of duty, and the measure of that duty is the treaty. It is not strange, therefore, that, in order to avoid the obligation to extradite their citizen, the states of Europe have industriously inserted in their treaties an express stipulation to exempt themselves from that obligation. With respect to those who are to be surrendered, they usually employ, as is done in the treaty between the United States and Italy, the general term 'persons.' Having used this term, they then proceed to insert a clause to except their citizens from the general obligation; and it is by means of this clause, and not by reason of an implication created by international law, that the duty of surrender is avoided.

"More cogent proof of this fact could not be found than is afforded by the extradition treaties of the United States with European nations, to which you refer for the purpose of showing that this Government has recognized the exemption of citizens by international law. Among those treaties is that with Prussia and other German states, concluded June 16, 1852, which is the first in which the United States admitted an exception of citizens. It is a part of the public history of extradition that for years the Government of the United States refused to negotiate treaties for the surrender of fugitives from justice with several of the states of Europe, because, owing to the limitations of their domestic laws, they insisted upon the insertion of a clause to exempt their citizens. It was for this reason alone that this Government, in order to avoid the misfortune of a total lack of extradition, finally admitted the exception. Accordingly, we find in the preamble to the treaty with Prussia and other German states, the following recital: 'Whereas it is found expedient for the better administration of justice

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own citizens or subjects, but to this proposal Mr. Gresham, Secretary of State, replied: "The President is unwilling to enter into any treaty of extradition which will exclude citizens or subjects

and the prevention of crime within the territories and jurisdiction of the parties respectively that persons committing certain heinous crimes, being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, and also to enumerate such crimes explicitly; and whereas the laws and constitution of Prussia, and of the other German states, parties to the convention, forbid them to surrender their own citizens to a foreign jurisdiction, the Government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States: Therefore, etc.'

"This recital, it is to be observed, was not a declaration by the United States alone, but by both parties, of the reason for the exclusion of citizens. The same declaration is found in the treaty with Bavaria of 1853, with Austria-Hungary of 1857, with Baden of 1857, and with various German states by virtue of their accession to the treaty with Prussia, which was, in 1868, finally extended to the whole of the north German Confederation.

"In the record of the negotiation of the treaty with Italy no reference is found to the subject of citizens. What may have been said in the oral discussions cannot now be discovered. It is, however, a matter of record in this Department that in the same year, 1868, Mr. Seward, who, as Secretary of State, signed the treaty on the part of the United States, refused to conclude a convention with Belgium because she insisted upon the exception of her citizens. In this relation I may advert to another fact which possesses great significance. The treaty of extradition concluded between the United States and Italy in 1868 was one of two treaties concluded between those countries in that year, the other relating to the rights and privileges of consuls. These treaties were designed to take the place of the treaties formerly made between the United States and the independent states of Sardinia and the Two Sicilies. In the treaty with the latter Government of 1855, there were stipulations relating to extradition, and among them was the following provision: 'The citizens and subjects of each of the high contracting parties shall remain exempt from the stipulations of the preceding articles, as far as they relate to the surrender of fugitive criminals.' (Article XXIV.)

"In view of the existence of this clause in the treaty with the Two Sicilies, it can scarcely be supposed that the parties to the substitutionary arrangement of 1868, negotiated that instrument in oblivion of the question as to citizens. And when we consider the omission of the clause, especially in conjunction with Mr. Seward's refusal to negotiate with Belgium, the inference seems to be morally irresistible that the obligation to deliver up their citizens, under the treaty of 1868, was fully understood by the contracting parties at the time of its conclusion.

"From what has been stated I am forced to conclude, not only that international law does not except citizens from surrender, but also that it has been well understood, especially in

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of either country from its operations. No good reason is perceived why citizens of the United States who commit crimes in Italy, or Italian subjects who commit crimes in the United States,

dealing with the United States, that the term 'persons' includes citizens and requires their extradition, unless they are expressly exempted.

"Nor am I able to find sufficient ground for the refusal to surrender citizens in the general principles on which extradition is conducted. It does not satisfy the ends of justice to say that, although a nation does not extradite its citizens, it undertakes to try and punish them. This argument may be admitted to have great force where, by reason of the absence of any conventional assurance of reciprocity, a nation declines a demand addressed to its discretion. But the chief object of extradition is to secure the punishment of crime at the place where it was committed, in accordance with the law which was then and there of paramount obligation. It is for this purpose that extradition treaties are made, and, except in so far as their stipulations may prevent the realization of that design, they are to be executed so as to give it full effect. It is at the place where the offense was committed that it can most efficiently and most certainly be prosecuted. It is there that the greatest interest is felt in its punishment and the moral effect of retribution most needed. There, also, the accused has the best opportunity for defense, in being confronted with the witnesses against him; in enjoying the privilege of cross-examining them; and in exercising the right to call his own witnesses to give their testimony in the presence of his judges. These and other weighty considerations, which it is not necessary to state, have led what I am inclined to regard as the great preponderance of authorities on international law at the present day to condemn the exception of citizens from the operation of treaties of extradition. In France I need only to refer to such well-known writers on extradition as Billot and Bernard. In Italy I may refer again to the eminent publicist Fiore, who says that, in spite of all that has been said on the subject, his opinion is that, while in former times the absolute prohibition against the surrender of citizens had some reason for its existence, it is insisted upon to-day rather as one of numerous conventional aphorisms, accepted without searching discussion for fear of showing too little regard for national dignity (Traite de Droit Penal Int., section 362). I will not extend the length of this note by citing other books, but, as showing the general view of eminent publicists, will refer to two resolutions of the Institute of International Law, adopted at the session at Oxford in 1881-82. Those resolutions are as follows:

"'VI. Between countries whose criminal legislation rests on like bases, and which should have mutual confidence in their judicial institutions, the extradition of citizens would be a means to assure the good administration of penal justice, since it ought to be regarded as desirable that the jurisdiction of the forum delicti commisi should, so far as possible, be called upon to judge.

"'VII. Admitting it to be the practice to withdraw citizens from extradition, account ought not to be taken of a nationality acquired only

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should not, if they take refuge in their own country, be delivered up by its authorities to the country whose laws they have violated. A refusal to surrender them would result, in the case of Americans committing crime in Italy, in an utter failure of justice; and though Italy may undertake to punish her subjects who, after committing crime here, return within her jurisdiction, yet the means of ascertaining the truth and doing justice must, under such conditions, always be difficult and often unattainable."[90]

It was decided by the courts of Switzerland that under the terms of the treaty between that country and the United States, a person charged with the commission of embezzlement in the United States, and who resisted extradition on the ground that he was a citizen of Switzerland and not subject to surrender, should, nevertheless, be delivered up. The treaty of 1850 between these two countries provided for the surrender of persons charged with crime, and had no stipulation exempting the citizens of the contracting parties from surrender. The stipulation was made in general terms, and no distinction was made between strangers and citizens.[91]

In 1893 the United States refused to surrender a person who had been committed for extradition to Mexico, under the terms of a treaty providing that the contracting parties should not be

after the perpetration of the act for which extradition is demanded. (Annuaire, v. 1881-82, pp. 127, 128.)'

"At the session at which these resolutions were adopted seventeen members and eight associates of the institute were present, including some of the most eminent publicists in Europe, and representing Italy, Germany, Austria, Belgium, Spain, France, Great Britain, Greece, Russia, and Sweden.

"In view of what has been shown, I am unable to discover any ground of reconciliation of the totally opposite views entertained by the United States and Italy in regard to the force and effect of the treaty of 1868, unless the Government of Italy will reconsider its position. The present situation, therefore, seems to me to require either the denunciation of that treaty or the conclusion of new stipulations upon which the contracting parties will find themselves in agreement. If, as a part of those stipulations, citizens should be excepted, it would be essential to reach an understanding as to the effect of naturalization. These matters it is not my purpose to discuss on the present occasion, but I deem it my duty to suggest them for consideration." Mr. Blaine, Secretary of State, to Baron Fava, Ital. Min., June 23, 1890, For. Rel. 1890, 559.

[90] For. Rel. 1894, 361, 364; 4 Moore Int. L. Dig. 297.

[91] Mr. Washburne, Minister to Switzerland, to Mr. Blaine, Secretary of State, No. 50, March 23, 1891, 28 MS. Desp. from Switzerland.

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bound to deliver up their own citizens. This action was placed on the ground that it appeared from the evidence that he was a citizen of the United States.[92]

§ 326. **Under the Mexican law.**—Under the Mexican law a foreigner acquiring real estate becomes a citizen, and on this ground the Mexican government, in 1895, refused to surrender to the United States a fugitive from justice who had purchased real estate in Mexico.[93] The treaty of 1899 between the United States and Mexico, while providing that neither party shall be bound to deliver up its own citizens, also contains a stipulation that "the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so." In that year a woman charged with the murder of her husband in Mexico, although both were American citizens, was delivered up.[94] In 1884 the United States declined to surrender Alexander Trimble, an American citizen, to Mexico, on charges of robbery and murder, basing its refusal on the ground that the President was not authorized to act, as the treaty negatived any obligation of this character.[95] In 1878 certain Mexicans who had taken part in an assault on a jail in Texas were ordered surrendered, but before the order was carried into effect the governor of Texas made the issuance of the order the foundation of a demand for the extradition of other Mexicans as a matter of right, and on this ground the order was withdrawn.[96] In 1878 Mexico signified its willingness to grant the extradition of its citizens if it could receive a formal assurance of reciprocity. Mr. Evarts stated that he did not deem himself clothed with authority to give such a general pledge, and added: "Cases, however, may, and probably will, occur in which the President would not hesitate to exercise in due form whatever discretion in such matters might rest with him, were adequate provisions made by

[92] Mr. Gresham, Secretary of State, to Mr. Romero, Mexican Minister, May 13, 1893, Notes to Mexico, IX, 664.

[93] 4 Moore Int. L. Dig. 303; Mr. Olney, Secretary of State, Minister to Mexico, December 13, 1895, For. Rel. 1895, II, 1008; Mr. Mariscal, Minister of Foreign Affairs, to Mr. Butler, Chargé, January 23, 1896, For. Rel. 1895, II, 1010.

[94] For. Rel. 1899, 497-501.

[95] Report of Mr. Frelinghuysen, in Sen. Ex. Doc. 98, 48th Congress, 1st Session.

[96] For. Rel. 1878, 534, 539, 540.

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Congress to that end. In the absence of any provisions of law for the extradition of criminals in cases not covered by treaty obligations, it is very apparent that this government must reserve the right to decide upon its own circumstances each case which may be brought to its notice by your government."[97]

§ 327. **Citizen of another country.**—But while under a treaty American citizens may not be surrendered, this principle does not apply to the citizens of another country found within the limits of the United States. The correct view was expressed by Mr. Marcy: "If a Mexican citizen should commit a crime in England and flee to the United States, there is no doubt in my mind that this government would have a right to surrender him as a fugitive on a requisition under our treaty of extradition with her."[98] Hence it is not necessary that a foreign government should prove that the person whose extradition is sought is one of its citizens, "for its right to demand extradition is not limited to the case of its own citizens, but extends to all cases, save that of American citizenship."[99]

§ 328. **Political offenses.**—Extradition will not be granted for political offenses. It may be difficult, however, in many instances, to determine whether an offense is political within the sense of the term as used. On an application for extradition it is only necessary to show probable cause. As said by Chief Justice Marshall: "I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in chief, nor should I even require that which should absolutely convince my own mind of the guilt of the accused. But I ought to require, and I should require that probable cause be shown, and I understand probable cause to be a case made out by proof, furnishing good reason to believe that the crime alleged has been committed by the person charged with having com-

[97] 1 Moore on Extradition, 166. Other instances may be found cited in 1 Moore on Extradition, 166, showing the application of this principle.

[98] Mr. Marcy, Secretary of State, to Mr. Gadsen, Minister to Mexico, No. 54, October 22, 1855, MS. Mexico, XVII, 54.

[99] Mr. Gresham, Secretary of State, to the Attorney General, May 22, 1893, 192 MS. Dom. Let. 82.

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mitted it.''[100] It is the duty of a committing magistrate to determine whether the offense alleged is of a political nature.[101]

§ 329. **Final decision as to question.**—As different views prevail as to what acts constitute a political offense, the final decision must rest with the government in which the fugitive has found refuge.[102] The United States cannot consent that a German city shall surrender to a German state, on the ground of dereliction in military service, a citizen of the United States who is temporarily residing in such city.[103]

Under the law of the state of New York authorizing the governor to surrender to foreign government any person found within the state charged with the commission of any crime that, if committed in New York, would be punishable with death or imprisonment in the state prison, the governor of New York, in 1822, refused to surrender a person charged with murder, arson and robbery, where it appeared that the acts constituting the offense were committed by a band of from six hundred to fifteen hundred persons, who had armed themselves and had commenced an insurrection for the redress of alleged grievances.[104]

§ 330. **Some instances.**—During the progress of the Civil War, in 1863, an American vessel loaded with cotton, en route from Mexico to New York, was seized by passengers on board in the name of the Confederate government. Four of the offenders were arrested in Liverpool, their extradition having been requested on a charge of piracy. The case was finally decided on the ground that even if the acts constituted piracy, it was not such piracy as the treaties had in view, which the court considered to be piracy under municipal statutes.[105]

In 1864 one Burley, who professed to act on behalf of the Confederate government, seized an American boat, in American waters, not far from the shore of the state of Ohio. Burley was brought to Toronto, Canada, and his extradition was demanded on the charges of piracy, robbery and assault with attempt to

[100] 1 Burr's Trial, 11.

[101] In re Ezeta, 62 Fed. 972.

[102] Lord Derby to Colonel Hoffman, May 4, 1876, For. Rel. 1876.

[103] Mr. Cass, Secretary of State, to Mr. Schleiden, April 9, 1859, MS. Notes to Hanse Towns, VII, 31.

[104] MS. Misc. Let., December 30, 1837.

[105] In re Tivnam, 5 Best & S. 645.

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commit murder. He was remanded to Ohio for trial, the judges of Canada taking the ground that a *prima facie* case of robbery was clearly established.[106] But in 1864 certain persons who organized an expedition in Canada came to the town of St. Albans, in Vermont, and raided that town, committing many acts of violence. It appeared that the leader had a commission under the Confederate states, and he claimed that in making the raid he was acting as an officer, and that his companions were soldiers acting under his authority and command. It was held by the Canadian authorities that the attack was a hostile expedition, authorized both expressly and impliedly by the Confederate states.[107]

§ 331. **Raid at San Ignacio.**—Three Mexicans, named Inez Ruiz, Juan Duque and Jesus Guerra, were a part of an armed band who, crossing the Rio Grande from Texas to Mexico, December 10, 1892, attacked a garrison of soldiers stationed at the village of San Ignacio. This band wounded and killed some of the soldiers and captured others, whom they subsequently released. The band likewise burned the barracks of the soldiers and took away their horses and equipments, assaulted private citizens, burned houses in the village, extorted money from the inhabitants, and appropriated clothes and provisions. The raiders kidnaped three citizens and carried them over the boundary into Texas, although they afterward escaped. A revolutionary movement took place in Mexico under Garza in 1891, but Garza was not present at the time of the depredations and had no connections with the raiders, who displayed no uniform or flag, and whose only emblem indicating their identity was a red band around their hats. The Mexican Minister requested the extradition of the three Mexicans on charges of murder, arson, robbery and kidnaping committed in Mexico. The examining magistrate committed the prisoners for surrender, but they applied to the district court for release on *habeas corpus*, and that court held that the offense was of a political character, and ordered

[106] Dip. Cor. 1864, part II.

[107] The St. Albans Raid, by L. N. Benjamin, B. C. L., Montreal, 1865. In re Ezeta, 62 Fed. 972, Judge Morrow, District Judge, sitting as a committing magistrate, examined into the charges preferred against certain citizens of Salvador, and held that several of the offenses were political in character.

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the prisoners discharged. An appeal was taken to the supreme court of the United States, which held that the judgment of the magistrate rendered in good faith on legal evidence, to the effect that the accused was guilty of the act with which he was charged, and that the offense constituted an extraditable crime, is not reviewable on the weight of the evidence. Unless the judgment is palpably erroneous in law, it is final for the purposes of the preliminary examination.[108]

§ 332. **Pilcomayo mutineers.**—A mutiny took place on the Chilean gunboat, "Pilcomayo," March 31, 1891, while she was lying in the docks at Buenos Ayres, which resulted in the wounding of eleven of the crew and the death of three. The local police, at the instance of the commander, took twelve of the mutineers into custody, and the Chilean Minister requested their detention until the vessel was ready to depart for Chile, so that they might be transported to that country and tried for their offense. The Chilean government had ordered the dismantling of the "Pilcomayo," and this task was being performed at the time of the mutiny. It was understood that upon the completion of this task, the vessel was to be taken back to Chile and put

[108] Ornelas v. Ruiz, 161 U. S. 502, 16 Sup. Ct. Rep. 689, 40 L. ed. 787. Said the court: "Can it be said that the commissioner had no choice on the evidence, but to hold, in view of the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed, that this was a movement in aid of a political revolt, an insurrection or a civil war, and that acts which contained all the characteristics of crimes under the ordinary law were exempt from extradition because of the political intentions of those who committed them? In our opinion the inquiry must be answered in the negative. The contention that the right of the executive authority to determine what offenses charged are or are not purely political is not involved in any degree; nor are we concerned with the question of the actual criminality of petitioners if the commissioner had probable cause for his action. It is enough if it appear that there was legal evidence on which the commissioner might properly conclude that the accused had committed offenses within the treaty as charged, and so be justified in exercising his power to commit them to await the action of the executive department."

A writ of *habeas corpus* cannot perform the office of a writ of error. Oteiza y Cortes v. Jacobus, 136 U. S. 330, 10 Sup. Ct. Rep. 1031, 34 L. ed. 464; Benson v. McMahon, 127 U. S. 457, 8 Sup. Ct. Rep. 1240, 32 L. ed. 234; Fong Yue Ting v. United States, 149 U. S. 714, 13 Sup. Ct. Rep. 1016, 37 L. ed. 913.

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out of service, and that a part of the crew was to be taken overland and enlisted in the army. A judge of the Argentine Republic granted a writ of *habeas corpus* to the mutineers, and decided on the hearing that the exemption of ships of war from the jurisdiction of the local authorities could not extend to the length of bestowing authority to entertain jurisdiction over persons in foreign territory under its flag. The court decided, also, that by causing the men to be taken from the vessel and placed in the custody of the Argentine officials, the Chilean Minister had renounced or lost the right to remove and try them, a right which he might have exercised had they been retained on board of the vessel or held under arrest in the Chilean legation. It was intimated by the court that as the vessel had lost its character as a ship of war by dismantlement, it was improper to detain the mutineers as a part of the crew of a man-of-war. An appeal was taken from this decision to the supreme court of the Argentine Republic, which held that as the mutiny appeared to be for political reasons, the offense was to be considered a political one; and that as the taking of the mutineers to shore and their delivery to the Argentine authorities were caused by the inability of retaining them on board of the vessel, it was impossible to grant their return to the representative of Chile, without violating the rule exempting political offenders from extradition. The supreme court of that nation also held that by their delivery, the principle of public law which protects prisoners of war, whether public or insurrectionary, would be violated. It is a rule of international law, held the court, that by the commission of acts of hostility by foreign insurgents in the territorial waters of another state, delivery may be made of the vessels or things taken from them, but they themselves are not to be surrendered.[109]

§ 333. **Exemption from local jurisdiction.**—There is a class of cases in which it is understood that every sovereign waives a part of the complete exclusive jurisdiction which is an incident to sovereignty. A public vessel of war of a foreign nation at

[109] Mr. Buchanan, Minister to the Argentine Republic, to Mr. Hay, Secretary of State, No. 584, December 1, 1898, 37 MS. Desp. from Argentine Republic, inclosing a report of Mr. Francois S. Jones, Secretary of Legation, citing Fallos de la Suprema Corte de la Republica Argentina, 1893, XLIII, 321, 323.

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peace with the United States, coming into an American port and committing no breach of the laws, is exempt from the jurisdiction of the courts.[110] A libel was filed against the schooner "Exchange," alleging that the libelants were her sole owners when she sailed from Baltimore bound to St. Sebastians, in Spain, and that while lawfully and peaceably pursuing her voyage, she was violently and forcibly taken by certain persons, acting under the orders of Napoleon, out of the custody of the libelants, and disposed of in violation of their rights. It was alleged that the vessel had been brought into the port of Philadelphia; that no sentence or decree of condemnation had been pronounced against her by any court of competent jurisdiction, but that the property of the libelants in her remained unchanged and in full force. The United States attorney filed a suggestion to the effect that the vessel whose name had been changed belonged to the Emperor of France, and that while actually employed in his service, was compelled by stress of weather to seek the port of Philadephia for repairs; and that if the vessel was ever the property of the libelants, their title had been devested according to the decrees and laws of France. Upon the ground that a public armed vessel of a foreign sovereign in amity with the United States is not subject to the ordinary judicial tribunals of the country, so far as the question of title by which such sovereign holds the vessel is concerned, the circuit court, reversing the sentence of the district court, ordered the vessel to be restored to the litigants. On an appeal to the supreme court of the United States, Mr. Chief Justice Marshall, in delivering the opinion of the court said: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. . . . . The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar

[110] The Schooner Exchange v. McFaddon, 7 Cranch, 116, 3 L. ed. 287.

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circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may, in some instances, be tested by common usage and by common opinion growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.'' [111]

§ 334. **Attempt against life of President or other officers.**—It is now provided in many treaties that an attempt to take the life of the head of a nation shall not be considered a political offense. In the treaties concluded in 1882 and 1883 between the United States and Belgium and Luxemburg, a clause was inserted that an attempt against the head of the government or against any member of his family shall not be considered a political offense when such attempt comprises the act of murder, assassination or poisoning. Similar clauses were inserted in the recent treaties concluded with Russia and Denmark.[112] The extradition treaty of Brazil of 1897 provides that an attempt against the life of the President or vice-president of the United States, or the governor or lieutenant-governor of any state, or the President or vice-president of the United States of Brazil, or of the President or vice-president or governor of any of its states, shall not be considered a political crime when it is unconnected with political movements.

After the assassination of President Lincoln a request was made to several governments to surrender his assassin, should he be found within their jurisdictional limits, and in all cases none but a ready and favorable response was received. John H. Surratt, charged with complicity in the assassination, was arrested at Alexandria in 1866, and with the co-operation of the Egyptian authorities was placed on board of an American man-of-war.[113] While under the treaty with Italy, political offenses

[111] The Schooner Exchange v. McFaddon, 7 Cranch, 116, 3 L. ed. 287. See Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. Rep. 195, 46 L. ed. 264.

[112] The treaty with Russia referred to was concluded March 28, 1887, and the ratifications exchanged April 21, 1893. The treaty with Denmark was concluded January 6, 1902.

[113] 4 Moore Int. L. Dig. 343; 1 Moore on Extradition, 308.

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are not extraditable, the Department of State is not inclined to consider any case to be a political one merely because the victim is the head of the government.[114]

§ 335. **Case of anarchists.**—It was held by the court of queen's bench in England, in 1894, that to constitute an offense of a political character, "there must be two or more parties in the state, each seeking to impose the government of their own choice on the other," and that the offense must be "committed by one side or the other in pursuance of that object." Accordingly, anarchists, notwithstanding they claim that they are actuated by political motives, are not to be considered political offenders.[115]

§ 336. **Trial for different offense.**—It is now a settled rule in the United States that a fugitive who has been extradited from a foreign country upon a specified charge can be tried for that offense only until he has had a reasonable time and opportunity after his release or trial to return to the country from which he was taken.[116]

Mr. Justice Miller, after reviewing many authorities, summed up by saying: "Upon a review of these decisions of the federal and state courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty

[114] Mr. Hill, Acting Secretary of State, to Baron Fava, Tel. September 12, 1900, MS. Notes to Ital. Leg., IX, 462.

[115] In re Meunier, 2 Q. B. [1894] 415. In that case a fugitive from justice, who was charged with causing the explosion at the Café Véry, in Paris, as well as another explosion at the barracks of the government, was ordered delivered up.

[116] United States v. Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425; United States v. Watts, 8 Saw. (U. S.) 370, 14 Fed. 130; State v. Vanderpool, 39 Ohio St. 273, 48 Am. Rep. 431; Ex parte Coy, 32 Fed. 911; Commonwealth v. Hawes, 13 Bush (Ky.), 697, 26 Am. Rep. 242; Blandford v. State, 10 Tex. App. 627; Ex parte Hibbs, 26 Fed. 421; People v. Hannan, 9 Misc. Rep. 600, 30 N. Y. Supp. 370; People v. Stout, 81 Hun (N. Y.), 336, 30 N. Y. Supp. 898.

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can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him after his release or trial upon such charge to return to the country from whose asylum he had been forcibly taken under those proceedings."[117] Thus, a fugitive extradited for larceny cannot be extradited for forgery;[118] nor is a fugitive who has been extradited on an indictment filed in a state court subject to arrest by a federal court.[119] But where the distinction between principals and accessories has been abolished by statute, a fugitive extradited as an accessory may be tried as a principal.[120] A fugitive who is captured while voluntarily returning to the United States is not entitled to claim the benefit of this exemption.[121]

§ 337. **Pleading other offense.**—Judge Deady said that the detention of a person for a charge other than that for which he had been surrendered would be "not only an infraction of the contract between the parties to the treaty, but also a violation of the supreme law of this land in a matter directly involving his personal rights. A right of person or property secured or recognized by treaty may be set up as a defense to a prosecution in disregard of either with the same force and effect as if such right was secured by an act of Congress."[122]

In Ohio two persons, who were delivered by Canada for offenses specified in the treaty, were for such offenses convicted and sentenced. Subsequently they were indicted on other charges, and they pleaded in abatement that they could not be placed upon their trial on these charges until after the lapse of a

[117] United States v. Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425.

[118] In re Fitton, 45 Fed. 472.

[119] Cosgrove v. Winney, 174 U. S. 68, 19 Sup. Ct. Rep. 598; 43 L. ed. 897.

[120] In re Rowe, 77 Fed. 165, 23 C. C. A. 103, 40 U. S. App. 516; State v. Rowe, 104 Iowa, 327, 73 N. W. 834.

[121] Ward v. State, 102 Tenn. 727, 52 S. W. 997. See, also, In re Baruch, 41 Fed. 473; In re Reinitz, 39 Fed. 206, 4 L. R. A. 236; Hall v. Patterson, 45 Fed. 354; In re Cross, 43 Fed. 519; Ex parte McKnight, 48 Ohio St. 594, 28 N. E. 1034, 14 L. R. A. 130; State v. Hall, 40 Kan. 341, 10 Am. St. Rep. 202, 19 Pac. 920; Moletor v. Sonnen, 76 Wis. 312, 20 Am. St. Rep. 74, 44 N. W. 1100, 7 L. R. A. 818; In re Robinson, 29 Neb. 138, 26 Am. St. Rep. 379, 45 N. W. 268, 8 L. R. A. 309.

[122] In Ex parte Hibbs, 26 Fed. 421

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reasonable time after the expiration of their sentences for the crimes of which they had previously been convicted. This view was sustained by the supreme court of Ohio.[123]

§ 338. **Variances.**—A person whose extradition is obtained on a charge of setting fire to and burning a brick "house," alleged to have been inhabited as a retail shoe store, may be indicted and placed on trial for setting fire to and burning a store "building" occupied as a store.[124] So in a case where a fugitive was extradited from Canada on a charge of arson committed in the state of Iowa, and the information which constituted the foundation of the proceeding alleged that the arson was committed by the burning of a "house," which at the time of the act was "occupied and inhabited" by certain persons in conducting a business, but in the indictment on which he was convicted it was alleged that he burned a "store building," which was "occupied" as such by certain persons, it was held that the word "house" as employed in the information could not be considered a dwelling-house. This word, the court held, should be construed in connection with the other allegations, as a building used as a store, and consequently that no variance existed between the charge for which the extradition of the defendant had been secured and that on which he had been tried.[125]

Where a person is extradited on charges of forgery, embezzlement and larceny, it is not necessary that the government or commissioner should elect as to the charge for which he shall be tried. It is immaterial whether the indictment filed contain counts for forgery, larceny or embezzlement if the defendant is tried upon the facts which appear in evidence before the commissioner, and upon the charges, or one of the charges, for which he is surrendered.[126]

[123] State v. Vanderpool, 39 Ohio St. 273, 48 Am. Rep. 431. But see as to fugitive extradited from another state, State v. Leidigh, 47 Neb. 132, 66 N. W. 309; Lascelles v. State, 90 Ga. 362, 35 Am. St. Rep. 219, 16 S. E. 946; Lascelles v. Georgia, 148 U. S. 541, 13 Sup. Ct. Rep. 687, 37 L. ed. 551; State v. Patterson, 116 Mo. 516, 22 S. W. 698; Commonwealth v. Wright, 158 Mass. 151, 35 Am. St. Rep. 476, 33 N. E. 83, 19 L. R. A. 208; People v. Cross, 135 N. Y. 540, 31 Am. St. Rep. 853, 32 N. E. 247; State v. Glover, 112 N. C. 898, 17 S. E. 526.

[124] State v. Spiegel, 111 Iowa, 701, 83 N. W. 722.

[125] Cohn v. Jones, 100 Fed. 639.

[126] Bryant v. United States, 167 U. S. 104, 17 Sup. Ct. Rep. 744, 42 L. ed. 94.

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§ 339. Lesser offense.—Although the laws of a state permit a person to be convicted of a lesser crime under an indictment charging a higher one, it has been held that a person who has been surrendered in pursuance of a treaty of extradition on a charge of assault with intent to commit murder cannot be convicted of an assault with intent to do great bodily harm.[127]

It is said by the Department of State that "since the decision of the supreme court in the Rauscher case, it is believed by the Department to be well settled that a fugitive secured by extradition can neither be lawfully tried nor punished except for the offense for which his extradition was granted. And this rule holds good notwithstanding the offense for which it is proposed to try or convict him be included in that for which his extradition was granted, unless the former is also included in the treaty, which is not the case here. It is proper to say that this is also the view taken by the British government."[128]

§ 340. Arrest on prior charge.—The rule that an extradited prisoner is immune from arrest extends to the case when it is attempted to arrest him upon a prior judgment of conviction. Thus, several indictments were found against a person for conspiring to defraud the United States of duties upon imports, and of procuring the admission into the United States of goods in violation of the statute. He was convicted, sentenced to prison, took an appeal, was released on bail pending the appeal, and when the judgment of his conviction was affirmed, he fled to Canada. His extradition as a convict was demanded and refused, and immediately afterward a new demand was made, based upon an indictment on which he had not been tried. In compliance with this later demand he was surrendered by Canada, and while traveling on the train was arrested on a warrant based upon the former conviction, and lodged in prison. He sued out a writ of *habeas corpus*, and it was held that he should not be arrested or tried under the treaty for any other offense than that

[127] People v. Stout, 81 Hun, 336, 30 N. Y. Supp. 898; People v. Cross, 135 N. Y. 540, 31 Am. St. Rep. 850, 32 N. E. 246.

[128] Mr. Uhl, Acting Secretary of State, to Mr. Hanford, April 21, 1894, 196 MS. Dom. Let. 443. But as to the right to try a person brought from another state for another offense without giving him an opportunity to return, see Taylor v. Commonwealth, 29 Ky. Law Rep. 714, 96 S. W. 440.

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with which he was charged in extradition until he should have had a reasonable time to return unmolested to the country from which he was brought, and accordingly he was discharged.[129]

§ 341. Offense committed pending trial.—In the cases in which the principle has been announced that a fugitive extradited on one charge cannot be tried on another until the conclusion of the trial, and until he has had a reasonable time to return to the country from which he was extradited, the crime for which it has been attempted to place the extradited prisoner on trial was alleged to have been committed prior to his extradition. But suppose he should commit a crime after his return and before the expiration of the time that, under ordinary circumstances, would be allowed for his return? This question has recently been decided in a case in California where a prisoner charged with perjury was extradited from Canada and tried for the offense before a jury that disagreed. During the course of the trial the accused became a witness in his own behalf. Before a second trial was had on the original indictment upon which his extradition had been secured he was indicted for alleged perjury in testimony given by him as a witness at the trial, and upon the second indictment was tried and convicted. He contended, in a proceeding of *habeas corpus*, that as he had been extradited from Canada upon a specific indictment, he could not be tried upon any other charge until the original charge had been disposed of and a reasonable time had been given to him within which to return to the country from which he had been extradited. The court held that the defendant could properly be tried for the offense committed after his surrender before the final disposition of the first charge, and in the course of the opinion delivered by Mr. Justice Henshaw, said: "The obligation assumed by the country demanding the surrender is that such surrender will not be used for the purpose of putting the prisoner on trial for any other offense which he may be claimed to have committed before he sought the asylum of the foreign country; but we cannot see that there would be any breach of inter-

[129] Ex parte Brown, 205 U. S. 309, 27 Sup. Ct. Rep. 539, 51 L. ed. 816; S. C., 148 Fed. 68.

This was held to be so although the words "or be punished" were omitted in the treaty, after the provision that no person surrendered shall be triable or tried. Id.

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national faith in compelling him, in common with other persons within the jurisdiction, to assume responsibility for any offense which he may commit after his return. In such case there is no possibility of the extradition proceedings being used as a subterfuge to pursue the accused for an offense other than the one for which he was extradited. In the absence of any authority compelling such conclusion, we are not prepared to hold that a person extradited under a treaty may, after his return, and pending his trial upon the extradition charge, commit any crime, however atrocious, with absolute security against prosecution until he shall have had an opportunity to return to the country from which he was taken." [130]

[130] Ex parte Collins (Cal.), 90 Pac. 827, 830. The court said that in the Rauscher Case, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425, as well as in every other case called to their attention, the crime for which it was attempted to try the extradited prisoner was one which it was alleged had been committed prior to his extradition. "In the present case," said the court, "on the contrary, the crime with which Collins was charged and of which he was convicted was committed after his surrender by the authorities of the country in which he had sought a refuge, and after his return to the state of California. The question is whether the immunity against prosecution for another offense, declared in United States v. Rauscher and similar cases, extends to an offense committed subsequent to the extradition. No doubt there is language in United States v. Rauscher, general in its terms, which, taken without regard to the facts before the court, would lend countenance to the view that the prisoner is, until the conclusion of his trial for the offense on which he was extradited, and for a reasonable time thereafter, absolutely immune from prosecution on any other charge. It is an elementary doctrine, however, that expressions in judicial opinions are to be read in the light of the facts before the court, and it is necessary, therefore, to consider the grounds upon which the decision in this class of cases went in order to determine whether those grounds are applicable to the case of a crime committed after extradition. The reasoning of United States v. Rauscher is substantially this: That in the absence of treaty there is no obligation upon any country to surrender to another persons who are charged with crime in the latter country. That as a matter of comity such surrender might be made, but that, if made in pursuance of a demand or request for the surrender of a person accused of a specific crime, there is an implied undertaking on the part of the country receiving the surrender that such surrender is asked and received for the purpose of putting the accused on trial for that crime, and for no other purpose. When a treaty is adopted, providing for the surrender of persons accused of specific crimes, the same implied obligation exists, more particularly in view of the provision generally found in treaties of extradition, that, before any surrender shall be made,

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§ 342. **Application for requisition.**—Applications for extradition will not be inaugurated by the Department of State on the mere reference to it of papers "without a specific request or expression of the wish of the Department of Justice or of the authority of a state, as the case may be, through which the papers may come to this Department."[131] The word "accused" in a treaty means accused in due form of law, and where a proceeding by information is authorized, this will form the basis for extradition as well as an indictment.[132]

The Department of State will not allow technical reasons to control its conduct where a *prima facie* case is presented, but, acting in the interest of justice, will request extradition and leave it to the authorities of the country where the accused is found to decide as to his delivery.[133] Counsel will not be heard in opposition by the Department of State to its making of a demand for extradition.[134] The demand must emanate from the supreme political authority of the state asking extradition.[135] An affidavit for a requisition which is made on information and belief, and which is not predicated on facts within the knowledge of the affiant, is insufficient.[136] The governor of Porto Rico, under the provisions of the statute conferring upon him all the powers of the governors of the territories of the United States that are not locally inapplicable, is authorized, to the same extent

there must be some proof of the commission of the offense. To permit a country to seek the extradition of a person found in another country upon the ground that he is charged with the commission of a specific offense covered by an extradition treaty, and then, when his surrender has been granted upon that ground, to try him for some other offense, would make it possible to evade the provisions of the treaty, and to use it as a pretense for securing possession of the person of a prisoner whom it was not designed to try for the charge upon which his extradition was nominally sought, but for some other offense which might or might not be in itself extraditable."

[131] Mr. Fish, Secretary of State, to Mr. Pierrepont, February 2, 1876, 111 MS. Dom. Let. 539. See, also, Mr. Hay, Secretary of State, to Messrs. Kingsford & Son, February 25, 1899, 235 MS. Dom. Let. 152.

[132] State v. Rowe, 104 Iowa, 323, 73 N. W. 833.

[133] Mr. Bayard, Secretary of State, to Mr. Torrey, March 10, 1886, 159 MS. Dom. Let. 279.

[134] Mr. Gresham, Secretary of State, to Mr. Peffer, January 30, 1895, 200 MS. Dom. Let. 425.

[135] Cushing, 8 Op. Atty. Gen. 240.

[136] Ex parte Cheatham (Tex. Crim. App.), 95 S. W. 1077.

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as the governor of a territory, to issue a requisition for the rendition of a fugitive criminal.[137]

§ 343. **Mandate.**—Extradition proceedings may be initiated by the President without the requirement of such proof as would justify extradition.[138] At one time it was held that it was necessary to produce a requisition from the demanding government before the commissioner could act.[139] But the later view is that now it is not essential that there should be a requisition from the demanding government to enable a United States commissioner to entertain jurisdiction over extradition proceedings.[140]

Mr. Bayard, Secretary of State, said: "After a careful examination of the treaty now in force between the United States and Great Britain in reference to extradition, I have come to the conclusion that it is neither necessary nor proper that any mandate or other authorization should issue from this Department as a preliminary to arrest by the commissioners or other judicial officers in whom the function of arrest and examination in such cases is specifically vested. I am strengthened in this conclusion by the fact that in all cases in which the question had come up before the judicial department of this Government it has been held that, under the treaty in question and the distinctive legislation of the United States, no such preliminary process of this Department is requisite. It is proper, also, that this seems to be the general sense of those who represent Her Majesty's Government in such process, since in most cases the application for arrest is made directly to the commissioner, or other judicial authority vested with the jurisdiction, the case not coming before this Department until the application for surrender." [141]

§ 344. **Who may act as magistrate.**—A judge of a court of record of general jurisdiction has authority to entertain com-

[137] In re Kopel, 148 Fed. 505. See People v. Bingham, 102 N. Y. Supp. 878, 117 App. Div. 411.

[138] Cushing, 6 Op. Atty. Gen. 217.

[139] In re Herris, 32 Fed. 583; In re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6369; In re Farez, 7 Blatchf. 34, 345, Fed. Cas. Nos. 4644, 4645. See Kaine's Case, 14 How. 129, 14 L. ed. 355.

[140] Grin v. Shine, 187 U. S. 195, 23 Sup. Ct. Rep. 98, 47 L. ed. 130; Benson v. McMahon, 127 U. S. 457, 8 Sup. Ct. Rep. 1240, 32 L. ed. 234.

[141] Mr. Bayard, Secretary of State, to Mr. West, February 16, 1886, MS. Notes to Great Britain, XX, 189.

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plaints in extradition cases. It is not necessary to recite in the warrant of arrest issued by him that he possesses authority to act in such cases, because he does not need a special appointment for the purpose.[142] Under the law and treaties, a commissioner of the circuit court of the United States who has been specially appointed to act in extradition cases is a competent examining magistrate.[143] Such commissioner may grant continuances in his discretion, and a statute of the state limiting continuances to ten days does not limit his action.[144] But as to the amount of proof required, Judge Morrow, United States District Judge, sitting as a committing magistrate, held that as the defendants were found within the territory of California, the law of that state must furnish the rule of procedure in the examination.[145] The proceeding before the commissioner is not to be regarded as a final trial, but as a preliminary examination before a committing magistrate.[146] In such cases attorneys are not required to appear for foreign governments;[147] nor is it essential that the proceedings should either be conducted or approved by the attorney of the United States for the district.[148] There is no provision for bail in the law or in the treaties.[149]

§ 345. **Sufficiency of the complaint.**—A complaint made solely on information and belief, without attempting to set forth the sources of information or the grounds of belief, is defective.[150] But if it contains various counts, some of which are made on the personal knowledge of the complainant, the presence of a count based merely on information and belief will not invalidate the complaint.[151] If, however, a complaint is verified by the consul of a foreign government, in which the offense is properly

[142] Ex parte McCabe, 46 Fed. 363, 12 L. R. A. 589.

[143] Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. Rep. 406, 45 L. ed. 577; Nelson, 4 Op. Atty. Gen. 201; Calder's Case, 6 Op. Atty. Gen. 91.

[144] Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. Rep. 406, 45 L. ed. 577.

[145] In re Ezeta, 62 Fed. 972.

[146] Benson v. McMahon, 127 U. S. 457, 8 Sup. Ct. Rep. 1240, 32 L. ed. 234; In re Breen, 73 Fed. 458.

[147] Black, 9 Op. Atty. Gen. 497.

[148] Black, 9 Op. Atty. Gen. 246.

[149] In re Ezeta, 62 Fed. 972; In re Carrier, 57 Fed. 578; In re Wright, 123 Fed. 463. But see Wright v. Henkel, 190 U. S. 40, 23 Sup. Ct. Rep. 781, 47 L. ed. 948.

[150] Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. Rep. 406, 45 L. ed. 577.

[151] Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. Rep. 406, 45 L. ed. 577.

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charged, it will be sufficient, even if the affiant does not make the allegations on his personal knowledge of the facts.[152]

Where it is stated in a complaint that the complainant is the duly accredited official agent and representative of a foreign government, and it is signed by him as consul of that government, it is immaterial that he did not swear positively in the jurat that he was such consul.[153] And a complaint may be made by any person acting under the authority of the foreign government who has knowledge of the facts, or, in the absence of such person, by a consul or official representative of the foreign government founded upon depositions in his possession.[154] It is sufficient if it appears that the complainant is acting for the foreign government.[155]

While the request or authority of the government within whose jurisdiction the offense was committed must appear at some stage in the proceedings, it is not essential that it should appear in the first instance. Hence where a complaint was made by a person describing himself as "a resident and citizen of Montreal," but it did not show that it was made at the request or by authority of the government of Canada, it was held that a prisoner was not entitled to a discharge on *habeas corpus* where, on the hearing, it was shown that an agent to act in securing the extradition of the fugitive had been appointed by the Canadian government.[156]

The German imperial code supersedes certain laws of Prussia, but an application for extradition is not rendered defective by an allegation that the offense was committed contrary to the law of the Kingdom of Prussia.[157]

§ 346. Precision of indictment not required.—It is not necessary that the complaint should set out the offense with the particularity of an indictment, but it will be sufficient if it is in conformity with the requirements of a preliminary complaint under the local law of the place in which the accused is found.[158]

[152] In re Farez, 7 Blatchf. 345, Fed. Cas. No. 4645.

[153] In re Adult, 55 Fed. 376.

[154] Grin v. Shine, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130.

[155] In re Orpen, 86 Fed. 760.

[156] In re Mineau, 45 Fed. 188.

[157] Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. Rep. 484, 46 L. ed. 534.

[158] In re Herskovitz, 136 Fed. 713.

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Article 10 of the treaty with Great Britain authorizes extradition of persons charged with "assault with intent to commit murder." An information charging the accused with "assault with intent to kill and murder" is sufficient to bring the offense within this provision.[159]

§ 347. Ordinary technicalities not applicable.—The purpose of a proceeding in extradition is to put the person on trial under the laws of his own country, and as it is unreasonable to expect that there will be an exact correspondence between the laws of the two countries, the ordinary technicalities of criminal proceedings are in the contruction and carrying out of treaties of extradition applicable only to a limited extent. The indictment is to be construed not by one general description alone, but by a full and liberal consideration of all its substantial averments.[160] A complaint charging an offense at common law is not defective because it concludes "against the form of the statute," and in such case no proof of the foreign statute is necessary.[161] If it clearly appears that a treaty offense was meant to be charged, the complaint will be sufficient.[162] Where a person is extradited under an indictment charging an extraditable offense, and the indictment is quashed in the demanding state, he is not entitled to a reasonable time to return before being called on to answer a new indictment charging the same offense.[163]

§ 348. Arrest of fugitive.—"It is a common practice for magistrates to issue warrants for the arrest of fugitives from justice, and to detain them for a reasonable time on complaint duly made before them by consular officers on the strength of telegraphic information received from their government."[164] The fugitive may be arrested a second time on a new complaint.[165]

The practice of issuing warrants for arrest is governed by the provisions of the Revised Statutes of the United States, and is

[159] United States v. Piaza, 133 Fed. 998.

[160] United States v. Greene, 146 Fed. 766.

[161] Ex parte Lane, 6 Fed. 34.

[162] In re Roth, 15 Fed. 506.

[163] Ex parte Fischl (Tex. Crim. App.), 100 S. W. 773.

[164] Mr. Moore, Assistant Secretary of State, to the Attorney General, May 26, 1898, 227 MS. Dom. Let. 651.

[165] Cushing, 6 Op. Atty. Gen. 91; In re Macdonnell, 11 Blatchf. 170, Fed. Cas. No. 8772.

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well settled.[166] It is the duty of a United States marshal who executes a warrant of arrest issued by an extradition commissioner in another district or state to take the prisoner for examination before the nearest magistrate in the district in which the arrest is made.[167] Wrere the British government has applied for the extradition of a fugitive, his arrest may be made on a British vessel in the waters of the United States.[168] A commitment of the accused for extradition from the United States will not be invalidated by evidence of malice on the part of the prosecuting witness, at whose instance the criminal prosecution was commenced in a foreign country.[169]

§ **349. Provisional arrest.**—The treaty between the United States and Mexico of February 22, 1899, provides for the provisional arrest and detention of fugitives from justice by declaring that each government, in receiving a proper request, shall endeavor to procure the arrest of the criminal, "and to keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of the documents upon which the claim for extradition is founded." Mr. Hill, Acting Secretary of State, in a case where this limit had nearly expired, suggested that the papers should be promptly forwarded to the examining magistrate, stating that there was no provision under the laws of the United States for extending the period of provisional detention provided for by the treaty.[170] But where the treaty contains no such provision, it would seem that there is no limit. In 1888 Mr. Bayard, Secretary of State, in a note to the Belgian government, called attention to the decision of the supreme court of the United States in Benson v. McMahon,[171] holding that under section 5270 of the Revised Statutes, a fugitive may be arrested and held for examination without inter-

[166] Rev. Stats., secs. 5270, 5271; In re Mineau, 45 Fed. 188.

[167] Pettit v. Walshe, 194 U. S. 205, 24 Sup. Ct. Rep. 657, 48 L. ed. 938.

[168] In re Newman, 79 Fed. 622.

[169] In re Herskovitz, 136 Fed. 713. Where a person has been brought into the state by means of extradition, a civil suit may be instituted against him before his discharge. He is not entitled to a reasonable time after his discharge to permit him to return to the state whence he came before such a suit may be commenced. Rutledge v. Krauss, 73 N. J. L. 397, 63 Atl. 988.

[170] To Mr. Aspiroz, Mexican Ambassador, No. 174, May 14, 1901, MS. Notes to Mexican Leg., X, 555.

[171] 127 U. S. 457, 8 Sup. Ct. Rep. 1240, 32 L. ed. 234.

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vention on the part of the President, or without proof of the making of a requisition, and said: "Under the statute it is believed that there exists in the United States a very liberal system of provisional arrest and detention of fugitives from foreign justice, under which, upon oaths made on information and belief (a requirement which the preliminary mandate did not dispense with), such fugitives are constantly arrested and held without interference on the part of the executive branch of the Government of the United States to await examination before our judicial magistrates in accordance with our laws. No time is specified during which a fugitive may be so held; but the judicial officer decides in each case what term is reasonable under all the circumstances for the detention of the fugitives pending the reception of the formal proofs of his culpability and their examination. Save in cases in which the question of the necessity of executive interference was formally raised, this Department has received no complaints of the refusal of judicial magistrates to grant proper facilities. On the contrary, it is believed that such magistrates have generally construed their powers with as much liberality as is consistent with the security which all persons, both citizens and foreigners, should enjoy against unfounded arrest and detention." [172]

§ 350. Evidence required.—Where the evidence submitted shows a probability of guilt of such a character that a cautious man would be led to believe that the fugitive is guilty of the offense with which he is charged, it is sufficient for his commitment for surrender.[173] In England it is sufficient that *prima facie* evidence is produced of what would be a crime against English law.[174] Proofs are admissible where the certificate of the American Ambassador states that they "are properly and legally au-

[172] Mr. Bayard, Secretary of State, to Mr. Parkhurst, No. 18, January 28, 1898, For. Rel. 1889, 50, 53.

[173] In re Ezeta, 62 Fed. 972; Munns v. De Nemours, 3 Wash. C. C. 31, Fed. Cas. No. 9926; In re Farez, 7 Blatchf. 345, Fed. Cas. No. 4645; In re Behrendt, 22 Fed. 699, 23 Blatchf. 40; Benson v. McMahon, 127 U. S. 462, 8 Sup. Ct. Rep. 1240, 32 L. ed. 234; In re Wadge, 15 Fed. 864, 16 Fed. 332, 21 Blatchf. 300; In re Macdonnell, 11 Blatchf. 170, Fed. Cas. No. 8772.

[174] In re Bellencontre, 2 Q. B. D. 122.

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thenticated, so as to entitle them to be received in evidence for similar purposes by the tribunals of Great Britain."[175]

Under the federal statute providing for the authentication of depositions taken in a foreign country to be used in extradition proceedings, it is sufficient if the certificate of a principal diplomatic or consular officer of the United States follows the words of the statute.[176] A commissioner is justified in committing a prisoner for extradition on a charge of forgery by circumstantial evidence as to the manner of drawing checks and posting books by an employee.[177] If a certificate is signed by the chargé d'affaires *ad interim*, the court will take judicial notice that he was the principal diplomatic officer when the certificate was given.[178]

§ 351. **Foreign depositions.**—Where the statute provides that foreign depositions and other documents may be received in extradition proceedings when certified as "properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped," the addition of the words "as evidence" will not vitiate the certificate.[179]

The same weight is to be allowed to depositions as if the deponent was present at the hearing.[180] Papers purporting to be depositions, and duly certified as required by law, are admissible for what they are worth, although from the recitals contained in the introductory part it does not distinctly appear that the statements contained in the papers were made on oath.[181]

In a proceeding to extradite on a charge of embezzlement for a failure to account for moneys received, it is immaterial whether the amount accounted for was, according to certain testimony, greater or less than the amount charged.[182] Where a treaty provides that extradition shall be granted only "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found," would justify his

[175] In re Breen, 73 Fed. 458.

[176] In re Krojanker, 44 Fed. 482; In re Behrendt, 23 Blatchf. 40, 22 Fed. 699. See, also, In re Ezeta, 62 Fed. 972.

[177] In re Bryant, 80 Fed. 282.

[178] In re Orpen, 86 Fed. 760.

[179] Grin v. Shine, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130.

[180] In re Farez, 7 Blatchf. 491, Fed. Cas. No. 4646. See In re Wadge, 16 Fed. 332, 21 Blatchf. 300.

[181] In re Ezeta, 62 Fed. 972.

[182] In re Breen, 73 Fed. 458.

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apprehension and commitment for trial if the offense had been committed in such place, the law of the state in which he is found will be the law of the place by which the proceeding will be governed.[183]

§ 352. Evidence on behalf of fugitive.—On his examination before a magistrate the fugitive has the right to produce witnesses in his own behalf.[184] Evidence of insanity may be received to rebut the presumption of guilt.[185] On a charge of attempt to commit murder, where it was alleged by the prisoner that he was acting in obedience to the command of a superior officer, and that his victim was the aggressor, it was held that these were matters of justification and defense which could properly be determined only by a trial in the country seeking his extradition.[186] It is not necessary that the evidence should be conclusive, or that the commissioner should be absolutely convinced of the guilt of the accused, but it will be sufficient if the prisoner is held on competent legal evidence, and there is probable cause for believing him guilty of the offense with which he is charged.[187]

§ 353. Habeas corpus proceedings.—Writs of *habeas corpus* may be granted by the federal courts when it appears that a person is deprived of his liberty in violation of a law or a treaty of the United States, and where it is sought to try a person for an offense other than that for which he was surrendered, a writ may issue.[188] It is a settled rule that a writ of *habeas corpus* cannot perform the office of a writ of error. If the committing magistrate has jurisdiction of the subject matter, and if the offense charged is within the terms of the treaty, and there is competent legal evidence before him sufficient to authorize him

[183] Pettit v. Walshe, 194 U. S. 205, 24 Sup. Ct. Rep. 657, 48 L. ed. 938; In re Frank, 107 Fed. 272.

[184] In re Farez, 7 Blatchf. 345, Fed. Cas. No. 4645; In re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6369; Ex parte Ross, 2 Bond, 252, Fed. Cas. No. 12,069; In re Kelley, 25 Fed. 268.

[185] Phillips, 6 Op. Atty. Gen. 642.

[186] In re Cienfuegos, 62 Fed. 972. The Department of State refused to surrender the prisoner, for the reason that the crime for which he was committed was not mentioned in the requisition for his extradition, the crimes there specified being murder, arson and robbery. American Law Rev., January, February, 1895, 8.

[187] United States v. Piaza, 133 Fed. 998.

[188] Cohn v. Jones, 100 Fed. 639.

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to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purpose of extradition, his decision will not be reviewed on *habeas corpus*.[189] Ordinarily, the federal courts will not interfere with a prosecution pending in a state court until the party whose rights are invaded has exhausted every remedy for relief which the laws of the state afford.[190]

[189] Ornelas v. Ruiz, 161 U. S. 502, 16 Sup. Ct. Rep. 689, 40 L. ed. 787; Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. Rep. 484, 46 L. ed. 534; Bryant v. United States, 167 U. S. 104, 17 Sup. Ct. Rep. 744, 42 L. ed. 94; In re Krojanker, 44 Fed. 482; In re Adutt, 55 Fed. 376; Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. Rep. 302, 45 L. ed. 448.

[190] Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. Rep. 297, 40 L. ed. 406; New York v. Eno, 155 U. S. 89, 15 Sup. Ct. Rep. 30, 39 L. ed. 80; Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. Rep. 734, 29 L. ed. 868; Baker v. Grice, 169 U. S. 284, 18 Sup. Ct. Rep. 323, 42 L. ed. 748; Minnesota v. Brundage, 180 U. S. 499, 21 Sup. Ct. Rep. 455, 45 L. ed. 639; Robb v. Connolly, 111 U. S. 624, 4 Sup. Ct. Rep. 544, 28 L. ed. 542; United States v. Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425; Ex parte Collins, 154 Fed. 980, In Whitten v. Tomlinson, 160 U. S. 231, 240-242, 16 Sup. Ct. Rep. 297, 40 L. ed. 406, it is said: "The power thus granted to the courts and judges of the United States clearly extends to prisoners held in custody, under the authority of a State, in violation of the Constitution, laws or treaties of the United States. But in the exercise of this power the courts of the United States are not bound to discharge by writ of *habeas corpus* every such prisoner.

"The principles which should govern their action in this matter were stated upon great consideration, in the leading case of Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. Rep. 734, 29 L. ed. 868, and were repeated in one of the most recent cases upon the subject, as follows:

"'We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. 'Where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of

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§ 354. Appeal and not writ of error.—Where the construction of a treaty of extradition is involved, an appeal, and not a writ of error, from a decision of a district court denying an application for a discharge upon a writ of *habeas corpus* is authorized by

such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinate to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States.' Ex parte Royall, 117 U. S. 241, 251-253, 6 Sup. Ct. Rep. 734, 29 L. ed. 868; New York v. Eno, 155 U. S. 89, 93-95, 15 Sup. Ct. Rep. 30, 39 L. ed. 80.

"In Ex parte Royall and in New York v. Eno, it was recognized that in cases of urgency, such as those of prisoners in custody, by authority of a State, for an act done or omitted to be done in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government, or its relations to foreign nations, the courts of the United States should interpose by writ of *habeas corpus*.

"Such an exceptional case was In re Neagle, 135 U. S. 1, 10 Sup. Ct. Rep. 658, 34 L. ed. 55, in which a deputy marshal of the United States charged under the Constitution and laws of the United States with the duty of guarding and protecting a judge of a court of the United States, and of doing whatever might be necessary for that purpose, even to the taking of human life, was discharged on *habeas corpus* from custody under commitment by a magistrate of a State on a charge of homicide committed in the performance of that duty.

"Such was In re Loney, 134 U. S. 372, 10 Sup. Ct. Rep. 584, 33 L. ed. 949, in which a person arrested by order of a magistrate of a State, for perjury in testimony given in the case of a contested Congressional election, was discharged on *habeas corpus*, because a charge of such perjury was within the exclusive cognizance of the courts of the United States, and to permit it to be prosecuted in the state courts would greatly impede and embarrass the administration of justice in a national tribunal.

"Such, again, was Wildenhaus' Case, 120 U. S. 1, 7 Sup. Ct. Rep. 385, 30 L. ed. 565, in which the question was decided on *habeas corpus* whether an arrest, under authority of a State, of one of the crew of a foreign merchant vessel, charged with the commission of a crime on board of her while in a port within the State, was contrary to the provisions of a treaty between the United States and the country to which the vessel belonged.

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the act providing for the creation and jurisdiction of the court of appeals. The fact that it becomes essential or proper for a federal circuit court to construe the acts of Congress passed for the purpose of effectuating the provisions of an extradition

"But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by *habeas corpus* in advance of a final determination of his case in the courts of the State; and even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this Court."

In Baker v. Grice, 169 U. S. 284, 18 Sup. Ct. Rep. 323, 42 L. ed. 748, violation of a Texas statute against the petitioner was charged with the trusts. He was discharged on *habeas corpus* by the circuit court on the ground that the statute conflicted with the constitution of the United States. But the supreme court of the United States reversed this action saying: "The court below had jurisdiction to issue the writ and to decide the questions which were argued before it. Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. Rep. 734, 29 L. ed. 868; Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. Rep. 297, 40 L. ed. 406. In the latter case most of the prior authorities are mentioned. From these cases it clearly appears, as the settled and proper procedure, that while Circuit Courts of the United States have jurisdiction, under the circumstances set forth in the foregoing statement, to issue the writ of *habeas corpus*, yet those courts ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency; and that instead of discharging they will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases In re Loney, 134 U. S. 372, 10 Sup. Ct. Rep. 584, 33 L. ed. 949, and In re Neagle, 135 U. S. 1, 10 Sup. Ct. Rep. 658, 34 L. ed. 55, but the reasons for the interference of the Federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal. Unless this case be of such exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court."

In Minnesota v. Brundage, 180 U. S. 499, 503, 21 Sup. Ct. Rep. 455, 45 L. ed. 639, the court, after referring to cases that are exceptions to the general rule, said: "The present case does not come within any of the exceptions to the general rule announced in the cases above cited. It is not,

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treaty will have no effect on the power of the supreme court of the United States to review the judgment if the determination of the case depends, in part, on the construction of the treaty.[191]

§ 355. **Consul may appeal.**—Upon a complaint made by the Mexican consul under oath, certain persons were committed for extradition to Mexico. They applied for a writ of *habeas corpus*, and they were granted a discharge on the ground that the offenses with which they were charged were political. The consul took an appeal to the supreme court of the United States, and the question was raised that he was not the real party interested, but the court held that he might properly prosecute the appeal, as the government of Mexico was the real party interested.[192]

§ 356. **Conflicting evidence.**—Although the evidence placed before the commissioner may be conflicting and far from producing conviction, the court will not, on *habeas corpus*, review the decision reached by him.[193] Writs of *habeas corpus* cannot put an end to proceedings for extradition regularly and constitu-

in any legal view, one of urgency. The accused does not, in his application, state any reason why he should not be required to bring the question involved in the prosecution against him before a higher court of the State and invoke its power to discharge him if in its judgment he is restrained of his liberty in violation of the Constitution of the United States. It cannot be assumed that the state court will hesitate to enforce any rights secured to him by that instrument; for upon them equally with the courts of the Union rests the duty to maintain the supreme law of the land. Robb v. Connolly, 111 U. S. 624, 637, 4 Sup. Ct. Rep. 544, 28 L. ed. 542. If the state court declined to recognize the Federal right specially claimed by the accused, the case could be brought here for review."

[191] Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. Rep. 406, 45 L. ed. 577; Pettit v. Walshe, 194 U. S. 205, 24 Sup. Ct. Rep. 657, 48 L. ed. 938. The fifth section of the act of 1891 permits an appeal directly from the district court to the supreme court of the United States "in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question." 26 Stats. at Large, 828.

[192] Ornelas v. Ruiz, 161 U. S. 502, 16 Sup. Ct. Rep. 689, 40 L. ed. 789. See, also, Mali v. Hudson County Common Jailkeeper, 120 U. S. 1, 7 Sup. Ct. Rep. 385, 30 L. ed. 565.

[193] Sternaman v. Peck, 80 Fed. 883, 26 C. C. A. 214.

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tionally taken under acts of Congress.[194] If the committing magistrate had competent evidence before him, and possessed jurisdiction, his decision cannot be reviewed on an application for a writ of *habeas corpus* on the ground that further evidence can be obtained.[195]

§ 357. Surrender of fugitive an executive function.—The treaty-making power, and the power of appointing and receiving ambassadors and other public ministers, clearly includes the power to surrender a fugitive to another nation. "Its exercise pertains to public policy and governmental administration, is devolved on the executive authority, and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs."[196] The President may authorize the employment of counsel by the United States in behalf of marshals of the United States against whom suits are brought for lawful acts done by them in the extradition of fugitives from justice,[197] and although the accused has been remanded on *habeas corpus*, the President, if he is of the opinion that the evidence produced is not sufficient to justify the issuance of a warrant of surrender, may refuse the surrender.[198] Consuls of the United States possess no authority to require masters of American vessels to take on board and carry to the United States persons who are accused of crime.[199] The Revised Statutes limits the time to two calendar months from his commitment by a magistrate for taking a prisoner out of the United States,[200] and the Department of State cannot extend this time.[201]

§ 358. Surrender upon different charge.—There is no authority in the President to surrender a fugitive upon any charge

[194] Terlinden v. Ames, 184 U. S. 270, 290, 22 Sup. Ct. Rep. 484, 46 L. ed. 534.

[195] Rex v. Governor of Holloway Prison, 87 L. T. 332; 71 Law J. K. B. 935. See, also, when it was held that where the commissioner has jurisdiction to investigate, it is improper to treat his warrant of remand as a nullity, United States v. Gaynor, L. R. App. Cas. 128.

[196] Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. Rep. 484, 46 L. ed. 534.

[197] Cushing, 6 Op. Atty. Gen. 500.

[198] Mr. Bayard, Secretary of State, to Mr. West, April 15, 1886, MS. Notes to Great Britain, XX, 233.

[199] Cushing, 7 Op. Atty. Gen. 722.

[200] Rev. Stats., sec. 5273.

[201] Mr. Olney, Secretary of State, to Messrs. Ingham & Hewitt, May 11, 1896, 210 MS. Dom. Let. 94.

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other than the one which a committing magistrate has heard and certified to be sustained by the evidence.[202] The warrant of the Secretary of State directing the surrender of a fugitive from justice is subject to the power of the courts of the United States to hold him for trial for any charge which may be pending in the United States against him.[203] There must be a certificate of criminality by the courts before the President can order the extradition.[204] If extradition is sought on two charges made in two different states, it is preferred that precedence should be given to the requisition based on the charge first presented by the United States.[205]

A government is not obligated to surrender a person held on a charge of crime committed within its own jurisdiction, and accordingly the attorney general of the United States directed that certain persons charged with the fraudulent use of the mails should be detained for trial instead of delivering them to an officer to be taken for examination for extradition on a charge of fraud committed in England.[206]

§ 359. **Refusal to surrender.**—It is not a ground for declining to surrender the accused that the persons directly injured have condoned the offense.[207] The United States cannot refuse to surrender a fugitive to Mexico because he subsequently rendered services to the government in assisting to apprehend and bring to justice his associates, as the surrender of fugitives under treaties of extradition is a matter of law, and no plea, unless it be a legal one, can be entertained to prevent the surrender.[208]

[202] Mr. Blaine, Secretary of State, to Sir J. Pauncefote, British Minister, May 17, 1892, MS. Notes to Great Britain, XXI, 664.

[203] Mr. Gresham, Secretary of State, to Mr. Romero, Mexican Minister, May 15, 1893, MS. Notes to Mexico, IX, 66.

[204] Cushing, 6 Op. Atty. Gen. 217.

[205] Mr. Hay, Secretary of State, to Messrs. Kingsford and Son, February 25, 1899, 235 MS. Dom. Let. 152.

[206] Mr. Hay, Secretary of State, to Sir J. Pauncefote, British Ambassador, No. 1336, February 4, 1889, MS. Notes to British Leg., XXIV, 435.

[207] Mr. Olney, Secretary of State, to Mr. Townsend, November 13, 1896, 213 MS. Dom. Let. 680.

[208] Mr. Rockhill, Secretary of State, to Mr. Sanchez, July 13, 1896, 211 MS. Dom. Let. 315.

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§ 360. **Release of debtor in jail under civil process.**—Section 753 of the Revised Statutes of the United States provides that "the writ of *habeas corpus* shall in no case extend to a prisoner in jail unless where he is in custody . . . . in violation of the Constitution or of a law or treaty of the United States." This section, however, will not prevent the release on *habeas corpus* of a debtor who is in jail under executions in civil actions, for the purpose of bringing him before a commissioner for examination. In such case the debtor is not confined in jail at the suit of the state, but of his creditors. A deputy marshal holding a commissioner's warrant for the arrest of a debtor on proceedings in extradition has an interest in the liberty of the debtor to an extent sufficient to authorize him to apply for the debtor's release on *habeas corpus*.[209] "This treaty is a part of the criminal law of the land. This prisoner is charged with a crime in another country, but the consideration for surrender is assistance in enforcing the criminal laws of this country. If arrest on civil process would prevent extradition, a safe asylum for fugitives from justice could be easily proved."[210]

§ 361. **Delivery within two months after commitment.**—Section 5273 of the Revised Statutes of the United States provides that if a person committed for extradition is not delivered up and conveyed out of the United States within two calendar months after such commitment over the time actually necessary to convey the prisoner from the jail to which he was committed by the readiest way out of the United States, any federal judge may, upon a proper showing and notice, order the person so committed to be discharged from custody, unless sufficient cause is shown why an order of discharge should not be made. It is no answer to such an application that an officer from the country seeking extradition is on his way to remove the prisoner, where the officer might, with the exercise of reasonable diligence, have been present before the making of the application, and no sufficient cause is shown for his delay.[211]

§ 362. **Transit across the United States.**—The conveyance of a prisoner of one nation across the territory of another is con-

[209] In re Mineau, 45 Fed. 188.
[210] In re Mineau, 45 Fed. 190. See, also, Moore on Extradition, sec. 370.
[211] In re Dawson, 101 Fed. 253.

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trary to the principles of international comity. In a case where a request was made by Canada for permission to bring a fugitive criminal from the West Indies to Toronto, through the territory of the United States, the Department of State declared: "There is no law of Congress authorizing the President or this Department to give the permission which the Canadian authorities request, and such permission, even if granted, could not avail to prevent the courts, upon the landing of the fugitive upon American soil, from releasing him by the writ of *habeas corpus.*"[212] President Cleveland, in his annual message of December 6, 1886, suggested that the statutes regulating extradition might be advantageously amended by providing for the transit across American territory of fugitives surrendered by a foreign government to a third state,[213] and President McKinley, in 1898, made a similar recommendation.[214]

§ 363. Restoration of property.—Under the general usage of extradition, where property is found on a fugitive at the time of his arrest, if it appears that it was secured by the crime with which he is charged, or if it is required as part of the evidence of the crime, it generally is turned over with the person surrendered. But if money taken from a prisoner presumptively belongs to him, it should be transferred under such conditions as will insure its return to him if it should finally transpire that it was his rightful property.[215]

The customs authorities seized certain jewels that were brought into the United States in violation of the revenue laws. They were stolen from the Princess of Orange, and the attorney general of the United States advised that as the person who had brought them into this country had obtained them fraudulently, against the will and without the knowledge of the owner, and as she had done nothing to subject them to forfeiture, they were not liable to condemnation. In law, he held, they stood on the same footing as if they had been cast upon the shore by the force of the winds and waves. No other claimant for the property ap-

[212] Mr. Strobel, Third Assistant Secretary of State, to Mr. Coppinger, Consul at Toronto, No. 9, February 20, 1894, 144 MS. Inst. Consuls, 411; Mr. Uhl, Acting Secretary of State, to Mr. Forman, February 20, 1894, 195 MS. Dom. Let. 520.

[213] For. Rel. 1886, XI.

[214] For. Rel. 1898, LXXIX.

[215] Knox, 23 Op. Atty. Gen. 535.

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peared, and as there was sufficient evidence that they were the property of the princess, the attorney general advised that the President might order the attorney for the United States to discontinue the prosecution, and might direct the marshal in whose custody the jewels were to deliver them to the Minister of the Netherlands.[216]

§ **364. Expenses of extradition.**—The demanding government should pay the expenses of extradition, including counsel fees.[217] A stipulation in a treaty that the "party" who makes the requisition and receives the fugitive shall bear the expenses, means the party to the treaty, and not the individual officer or authority of the government making the demand.[218] If, however, a fugitive is charged with an offense against the laws of a particular state, and extradition is demanded at the request of the state authorities, the expenses are borne by the state requesting the surrender of the fugitive.[219] If the offense is against the laws of a territory, the expenses must be borne by the territory.[220]

§ **365. Expenses of district attorney.**—Where the statute of a state makes it the duty of a district attorney to conduct the prosecution of crimes, he is entitled to reimbursement for expenses which he has necessarily incurred in obtaining the extradition from a foreign country of a fugitive from justice;[221] and a statute declaring it to be a misdemeanor for any officer of the state to request or receive any fee or compensation for services or expenses in procuring from the governor of a state a demand for the extradition of a fugitive from justice does not extend to expenses of a district attorney in procuring the extradition of a fugitive from a foreign country.[222]

[216] Taney, 2 Op. Atty. Gen. 482.

[217] Cushing, 7 Op. Atty. Gen. 396.

[218] People v. Board of Supervisors, 56 Hun, 17, 8 N. Y. Supp. 752.

[219] Mr. Fish, Secretary of State, to Mr. Harvey, June 18, 1874, 102 MS. Dom. Let. 458.

[220] Mr. Cadwalader, Acting Secretary of State, to Mr. Ferry, August 21, 1875, 109 MS. Dom. Let. 489.

[221] People v. Board of Supervisors, 56 Hun, 17, 8 N. Y. Supp. 752.

[222] People v. Supervisors, 134 N. Y. 1, 31 N. E. 322; Ellis v. Jacob, 45 N. Y. Supp. 177, 17 App. Div. 471.

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§ 366. **Method for payment of expenses.**—The method followed for the payment of expenses is for the commissioner who has heard the case to send to the Department of State a statement of costs including the expenses incurred by the marshal in paying the fees of witnesses, and thereupon money is transmitted to the marshal for the payment of the fees, or, if he has paid them, for his reimbursement.[223] A statute of a state which imposes on a county in which it is charged the offense has been committed the expense of returning from another state a fugitive from justice does not apply to a case where a fugitive is brought back from a foreign country.[224]

It is held by the Department of State that it is the duty of the demanding government to adduce the evidence which it expects to establish the criminality of the accused, and this must be done in such form and language as will be intelligible to and convenient for the court, and therefore, that a bill for the services of a translator is no proper part of the expenses of extradition.[225] If the United States is forced to intervene in a conflict between the authorities of a state and those of the United States to maintain its supremacy and secure the extradition, the special expenses should be paid, in the first instance, at least, by the United States.[226] A commissioner or marshal may lawfully charge such fees as are usual for analogous services rendered to the United States.[227]

§ 367. **Deserting seamen.**—The United States authorities cannot, in the absence of a treaty stipulation, surrender deserting seamen.[228] The Revised Statutes provide for the delivery up of deserting seamen to the consul or vice-consul of countries having

[223] Mr. Olney, Secretary of State, to Messrs. Joske Brothers, June 20, 1895, 202 MS. Dom. Let. 691.

[224] Goldfon v. Allegheny County, 14 Pa. Super. Ct. 75.

[225] Mr. Frelinghuysen, Secretary of State, to Mr. Patterson, April 2, 1884, 150 MS. Dom. Let. 448. The Department of State expressed the opinion that where it appeared that the customary per diem charges of Canadian commissioners were twenty dollars per day, it would not be proper to refuse to pay them. Mr. Gresham, Secretary of State, to Mr. Hensel, April 25, 1894, 196 MS. Dom. Let. 482.

[226] Cushing, 7 Op. Atty. Gen. 396.

[227] Black, 9 Op. Atty. Gen. 497.

[228] Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. Rep. 195, 46 L. ed. 264.

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appropriate treaties.[229] It would seem that no obligation is imposed by the Revised Statutes, or the British merchant shipping act, or the treaty stipulations between the United States, on the one hand, and Great Britain and Sweden and Norway on the other, on the master of a foreign vessel, or on the consuls of the foreign governments, to make arrests or reclamations of deserters for the protection of the country in which the desertions are made. These provisions seem to be intended for the benefit of the shipmaster, who may exercise his discretion in making or not making reclamation.[230] In 1901, and also in 1902, complaint was made by the German government that the object of the consular convention of December 11, 1871, was defeated by shipping commissioners, particularly by those of Portland and San Francisco, who required proof that the person claimed to be a deserter was a member of the crew, and also, who required it to be shown that the offense stated by the consul in his application for arrest had actually been committed, following the procedure in extradition cases. This complaint was referred to the attorney general, who rendered an opinion to the effect that this course was justified by section 5280 of the Revised Statutes, which was designed to effectuate treaty stipulations for the return of deserters, and that the practice was not at variance with the treaty, and advised that the consul should seek a decision of the point raised by some competent court.[231]

§ 368. Gradual extension of list of crimes included in treaties. No attempt has been made in the preceding sections to enumerate all the crimes for which extradition may be had, as these are not the same in all treaties, but the treaties with the different nations vary in this respect. The first treaty providing for the extradition of criminals was that entered into with Great Britain in 1794, which included as extraditable offenses only murder and forgery. Gradually the list has been extended, but in the treaties with some countries certain crimes are mentioned, while no reference is made to them in others. For instance, the crime of embezzlement is in some treaties an extraditable offense, and in others not. It may also be observed that in the extradition treaty

[229] Rev. Stats., sec. 5280.

[230] Mr. Hay, Secretary of State, to the Secretary of the Treasury, June 18, 1898, 229 MS. Dom. Let. 421.

[231] For. Rel. 1903, 411-417.

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with Belgium concluded October 26, 1901, one of the crimes for which extradition may be had is: "Obtaining money, valuable securities, or other property by false pretenses, when such an act is made criminal by the laws of both countries, and the amount of the money or the value of the property fraudulently obtained is not less than two hundred dollars, or one thousand francs." In the treaty with Denmark concluded January 6, 1902, among the extraditable crimes enumerated is: "Obtaining money, valuable securities, or other property by false pretenses, or receiving money, valuable securities, or other property, knowing the same to have been embezzled, stolen or fraudulently obtained, when such act is made criminal by the laws of both countries, and the amount of money or the value of the property fraudulently obtained or received is not less than $200, or kroner 740." In other extradition treaties offenses of this character are not mentioned at all. Bribery, which is generally not an extraditable offense, has been made extraditable by recent treaties with Mexico and the Netherlands. Therefore, in any given case, the treaty itself should be consulted to determine what crimes are included, as the matter is purely one of treaty regulation.

§ **369. Regulations of State Department.**—The State Department has made regulations for the issuance of requisitions to secure the extradition of fugitives from justice. All applications should be addressed to the Secretary of State, and be accompanied by the necessary papers. The application must come from the governor of a state or territory when the extradition is sought for an offense within the jurisdiction of the state or territorial courts, and from the attorney general when the offense is against the United States. The instructions issued by the Department of State will be found in the appendix.[232]

[232] See Appendix, I.

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CHAPTER XII.

TREATIES WITH INDIANS.

§ 370. Treaties with Indians.
§ 371. Dawes Commission.
§ 372. Report of commission.
§ 373. Further legislation.
§ 374. Tribe party to suit.
§ 375. Appeals to the supreme court.
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§ 383. Treaty-making power may dispose of government's title.
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§ 385. General acts of Congress not applicable to Indians.
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§ 389. Recognition of executive department followed by courts.
§ 390. Liberal construction of treaties.
§ 391. May be controlled by legislation.
§ 392. Technical meaning of treaties not to be considered.
§ 393. Indian tribe not a sovereign nation.

§ 370. Treaties with Indians.—The Constitution confers upon Congress the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.[1] But, beginning with the administration of Washington, and continuing to the year 1871, it had been the practice of the government to enter into treaties with the various Indian tribes. In 1789 President Washington sent a message to the Senate, in which he stated that it was the general understanding and practice of nations not to consider any treaty as final and conclusive until ratified by the sovereign or government from whom the commissioners signing the treaty derived their powers. "This practice," said he, "has been adopted by the United States respect-

[1] Const., art. I, sec. 8, cl. 3.

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ing their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians; for though such treaties being, on their part, made by their chiefs or rulers, need not be ratified by them, yet being formed on our part by the agency of subordinate officers, it seems to be both prudent and reasonable that their acts should not be binding on the nation until approved and ratified by the Government. It strikes me that this point should be well considered and stated, so that our national proceedings in this respect may become uniform and be directed by fixed and stable principles."[2] In 1871, a law was enacted that "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[3] In some instances, although the states are not permitted to make treaties, they did enter into treaties with Indian tribes occupying land within their limits.[4]

§ 371. **Dawes Commission.**—In the act making appropriations for current and contingent expenses, and fulfilling treaty stipulations with Indian tribes for the fiscal year ending June 30, 1894, Congress provided for a commission for the purpose of extinguishing the national or tribal title to any lands held by certain Indian tribes, with a view to such adjustment as may be requisite and suitable to enable the ultimate creation of a state or states of the Union in the territory in which such lands are situated. This commission became known as the "Dawes Commission" from the name of its chairman, Henry L. Dawes, of Massachusetts.[5]

[2] 1 Richardson's Messages, 61, 62.

[3] 16 U. S. Seals at Large, 566, 18 Id. 176; 19 Id. 58; Rev. Stats., sec. 2079. But it was declared that no obligation of any treaty lawfully made and ratified with any Indian nation or tribe prior to March 3, 1871, should be invalidated or impaired.

[4] See as to treaty between New York and the Mohawk Indians, 7 U. S. Stats. at Large, 61; as to treaty between state of Georgia and the Creek Nation, 7 U. S. Stats. at Large, 217; and as to treaty between the Seneca and Tuscarora Indians and individuals for the sale of lands, 7 U. S. Stats. at Large, 557, 559.

[5] 27 U. S. Stats. at Large, 612, 645. The section bearing on this subject is: "Sec. 16. The President shall nominate and, by and with the advice and consent of the Senate,

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§ 372. Report of commission.—In their report of November 18, 1895, the commission said that if citizenship should be left without control or supervision to the absolute determination of the tribal authorities, with power to decitizenize at will, the greatest injustice would be perpetrated, and many good and law-abiding citizens reduced to beggary. The commission felt compelled to report that so long as power in these nations should remain

shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation; the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.

"The Commissioners so appointed shall each receive a salary, to be paid during such time as they may be actually employed, under direction of the President, in the duties enjoined by this act, at the rate of five thousand dollars per annum, and shall also be paid their reasonable and proper expenses incurred in prosecution of the objects of this act, upon accounts therefor to be rendered to and allowed by the Secretary of the Interior from time to time. That such commissioners shall have power to employ a secretary, a stenographer, and such interpreter or interpreters as may be found necessary to the performance of their duties, and by order to fix their compensation, which shall be paid, upon the approval of the Secretary of the Interior, from time to time, with their reasonable and necessary expenses, upon accounts to be rendered as aforesaid; and may also employ, in like manner, and with the like approval, a surveyor or other assistant or agent, which they shall certify in writing to be necessary to the performance of any part of their duties.

"Such commissioners shall, under such regulations and directions as shall be prescribed by the President, through the Secretary of the Interior, enter upon negotiation with the several nations, of Indians as aforesaid in the Indian Territory, and shall endeavor to procure, first, such allotment of lands in severalty to the Indians belonging to each such nation, tribe, or band, respectively, as may be agreed upon as just and proper to provide for each such Indian a sufficient quantity of land for his or her needs, in such equal distribution and apportionment as may be found just and

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in the hands of those who were then exercising it, any further effort to induce them by negotiation to agree voluntarily to a change restoring to the people the benefit of the tribal property, and assuring them that security and order in government enjoyed by the people of the United States would be in vain. The commission were of the opinion that the insecurity of life, person and property increasing every day made immediate action imperative, and that "the pretense that the government is debarred by treaty obligations from interference in the present condition of affairs in this territory is without foundation. The present conditions are not 'treaty conditions.' There is not only no treaty obligation on the part of the United States to maintain, or even to per-

suited to the circumstances; for which purpose, after the terms of such an agreement shall have been arrived at, the said commissioners shall cause the lands of any such nation or tribe or band to be surveyed and the proper allotment to be designated; and, secondly, to procure the cession, for such price and upon such terms as shall be agreed upon, of any lands not found necessary to be so allotted or divided, to the United States; and to make proper agreements for the investment or holding by the United States of such moneys as may be paid or agreed to be paid to such nation or tribes or bands, or to any of the Indians thereof, for the extinguishment of their claims therein. But said commissioners shall, however, have power to negotiate any and all such agreements as, in view of all the circumstances affecting the subject, shall be found requisite and suitable to such an arrangement of the rights and interests and affairs of such nations, tribes, bands or Indians, or any of them, to enable the ultimate creation of a Territory of the United States with a view to the admission of the same as a state in the Union.

"The commissioners shall at any time, or from time to time, report to the Secretary of the Interior their transactions and the progress of their negotiations, and shall at any time, or from time to time, if separate agreements shall be made with any nation, tribe or band, in pursuance of the authority hereby conferred, report the same to the Secretary of the Interior for submission to Congress for its consideration and ratification.

"For the purposes aforesaid there is hereby appropriated out of any money in the Treasury of the United States, the sum of fifty thousand dollars, to be immediately available.

"Neither the provisions of this section nor the negotiations or agreements which may be had or made thereunder shall be held in any way to waive or impair any right of sovereignty which the Government of the United States has over or respecting said Indian Territory or the people thereof, or any other right of the Government relating to said Territory, its lands, or the people thereof. Approved March 3, 1893."

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mit, the present condition of affairs in the Indian territory, but, on the contrary, the whole structure and tenor of the treaties forbid it. If our government is obligated to maintain the treaties according to their original intent and purpose, it is obligated to block out at once present conditions. It has been most clearly shown that a restoration of the treaty status is not only an impossibility, but if a possibility, would be disastrous to the people and governments alike. The cry, therefore, of those who have brought about this condition of affairs to be let alone, not only finds no shelter in treaty obligations, but is a plea for permission to further violate those provisions."[6]

§ 373. **Further legislation.**—The commission under the Indian appropriation act of 1896 was directed to continue to exercise their authority and to endeavor to accomplish the objects prescribed to them,[7] and was also authorized to hear and determine the application of all persons applying for citizenship, and they were directed in determining such applications to respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, "and all treaties with either of said nations or tribes, and shall give due force and effect to the rules, usages, and customs of each of said nations or tribes."[8] In 1899, a United States court was established with a single judge, having jurisdiction over the Indian territory,[9] and in 1890, an act was passed to provide a temporary government for the territory of Oklahoma, and to enlarge the jurisdiction of the court.[10] In 1895 two additional judges were provided for the court, who were vested with all the authority, both in term time and in vacation, as to all causes, both criminal and civil, that might be brought in the district.[11] In 1897 a provision was made in the Indian appropriation act for the appointment of an additional

[6] The commissioner reported further: "The commission is compelled by the evidence forced upon them, during their examination into the administration of the so-called government in this territory, to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."

[7] 29 Stats. at Large, 321, 329.

[8] 29 Stats. at Large, 321-329.

[9] 25 Stats. at Large, 783.

[10] 26 Stats. at Large, 81, 93.

[11] 28 Stats. at Large, 693.

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judge for the United States court, and further powers were conferred upon the commission.[12]

§ 374. **Tribe party to suit.**—In 1898 an act was passed providing that when, in the progress of any civil suit, in law or in equity, pending in any federal court in any district in the territory, it should appear to the court that the property of any tribe was in any way affected by the issues being heard, the court was authorized and required to make the tribe a party to the suit by service upon the chief or governor of the tribe, and the suit should thereafter be conducted and determined as if the tribe had been an original party to the action. By this act further powers were also conferred upon the commission, and it was declared that after its passage, "the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States, in the Indian territory," and that after a fixed date, "all tribal courts in Indian territory shall be abolished and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said territory by filing with the clerk of the court the original papers in the suit."[13]

§ 375. **Appeals to the supreme court.**—The Indian appropriation act of July 1, 1898, provided that appeals should be allowed from the United States courts in the Indian territory direct to the supreme court of the United States to either party "in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship or the allotment of lands, in the Indian territory, under the rules and regulations governing appeals to said court in other cases," with certain limitations as to the time within which appeals should be perfected. The act also allowed appeals to be taken in cases decided prior to the passage of the act.[14] It was held that this provision was not invalid, because it was retrospective, nor was it to be con-

[12] 30 Stats. at Large, 84.
[13] 30 Stats. at Large, 495.
[14] 30 Stats. at Large, 571.

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sidered as invading the judicial domain, nor as destroying vested rights, because, although the decrees of the court were made final by statute, still the expectation of a share in the public lands and money of the tribe could not be considered such an absolute right of property as to prevent under subsequent legislation the review of these decrees by a higher court.[15]

§ 376. Constitutionality of legislation.—The legislation relative to the Indian tribes was challenged as in conflict with treaties made with them. The court said that it was well settled that an act of Congress may supersede a prior treaty, and that as the lands and money of these tribes are public, and not held in individual ownership, the acts of Congress providing for the determination of citizenship in the tribes were not unconstitutional as impairing or destroying vested rights.[16] An Indian tribe is capable, under the terms of the Constitution, of entering into treaty obligations with the government of the United States, although from the nature of the case such tribe is subject to the authority of the United States and to the exercise of its legislative power.[17]

§ 377. Indian treaties prior to legislation.—Prior to legislation by Congress treaties had been entered into with numerous Indian tribes. When this continent was discovered, the nations of Europe were desirous to appropriate to themselves such portions as they could secure, and that conflicting claims might be harmonized and wars averted, it was determined that the right of acquisition, as between themselves, should be determined by the principle of discovery, which gave title to the government under whose authority the discovery was made as against all other European governments. Possession would consummate the title thus commenced by discovery. The nation making the discovery had the sole right of acquiring the soil from the natives and establishing settlements upon it, and to the assertion of this right to which all European nations gave assent. While the

[15] Stephens v. Cherokee Nation, 174 U. S. 445, 19 Sup. Ct. Rep. 722, 43 L. ed. 1041.

[16] Stephens v. Cherokee Nation, 174 U. S. 445, 19 Sup. Ct. Rep. 722, 43 L. ed. 1041.

[17] Choctaw Nation v. United States, 119 U. S. 1, 7 Sup. Ct. Rep. 75, 30 L. ed. 306.

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rights of the original inhabitants were impaired to a large degree, they were not completely disregarded. They were deprived of their rights as independent nations to complete sovereignty, but it was conceded that they were rightful occupants of the soil, having a legal as well as just claim to hold its possession. As exclusive title was given to those who made discovery, it followed that the power of the original inhabitants to dispose of the soil as they pleased could not be admitted. The ultimate dominion was, according to this principle, in the different nations making discovery. By virtue of this dominion, these nations, while respecting the rights of occupancy of the natives, claimed to, and did, exercise the power to grant the soil, and grants made by them have been universally understood as conveying a title to the grantee, subject only to the right of occupancy on the part of the Indians.

§ 378. **Relinquishment by Great Britain.**—Great Britain, in the treaty of peace at the conclusion of the Revolution, acknowledged the United States, naming the respective states "to be free, sovereign and independent states," and "relinquishes all claim to Government Property & Territorial Rights of the same & every part thereof,"[18] and the states thus acquired the powers of government and the right to the soil previously existing in Great Britain. The exclusive power to extinguish the Indian right of occupancy was vested in the government, having for the time being the constitutional right to exercise it. Hence, a title to lands under grants to private individuals made by Indian tribes or nations cannot be recognized in the courts of the United States.[19]

§ 379. **Indian right of occupation.**—A grant to a railroad company of land to which the Indian title had not been extinguished conveys the fee to the company, subject, however, to the right of Indian occupancy. Private parties cannot interfere with or

[18] Treaty of 1783, art. 1; Comp. Treaties in Force, 293.

[19] Johnson v. McIntosh, 8 Wheat. 543, 5 L. ed. 681. As to discoveries and settlements made by citizens of the United States in Oregon, see Shively v. Bowlby, 152 U. S. 50, 14 Sup. Ct. Rep. 567, 38 L. ed. 350. See, also, Case v. Toftus, 14 Saw. 217, 39 Fed. 733, 5 L. R. A. 688; Stockton v. Williams, 1 Doug. (Mich.) 546; Montgomery v. Ives, 13 Smedes & M. (Miss.) 173.

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place in controversy the manner, time or conditions of extinguishing the Indian right of occupancy, as such questions are exclusively for the consideration of the government.[20] In determining what lands are occupied, consideration should be given to the habits and modes of the life of the Indians.[21] As the paramount source of title is in the United States, the government has the power to dispose of public lands situated within an Indian reservation, without the consent of the Indians.[22] But an Indian right of occupancy is sufficient foundation for the maintenance of an action of ejectment.[23] The fee is in the state of section 16 of every township occupied by Indians where the same has been granted to the state by the United States.[24]

§ **380. Cutting timber by Indians.**—It may be said, generally, that timber while standing on the land is a part of the realty and can be sold only as the land could be, and as land in the possession of Indians cannot be sold by them, the timber, until rightfully severed, cannot be sold. Logs not cut for the improvement of the land may be recovered by the United States in an action of replevin. It may also be said as the Indians possess only a right of occupancy in the lands, it is presumed that they have no authority to cut and sell timber, and every purchaser from them is charged with this presumption.[25] But a distinction is to be drawn where, under certain treaties and acts of Congress, Indian allottees are vested with sufficient title in their allotments, notwithstanding the restraint placed upon the alienation of the land to authorize the cutting of timber from the land for the purposes of sale, and not by way of improvements, without obtaining the sanction of the Department of the Interior.[26]

§ **381. Title of the United States devested by patent.**—So, where lands were allotted to the Chippewa Indians under a

[20] Buttz v. Northern Pac. R. R. Co., 119 U. S. 55, 7 Sup. Ct. Rep. 105, 30 L. ed. 330.

[21] Mitchell v. United States, 9 Pet. 746, 9 L. ed. 296.

[22] United States v. Alaska Assn., 79 Fed. 156.

[23] Marsh v. Brooks, 8 How. 232, 12 L. ed. 1060.

[24] Beecher v. Wetherby, 95 U. S. 525, 24 L. ed. 441; Roberts v. Railway Co., 43 Kan. 106, 22 Pac. 1007.

[25] United States v. Cook, 19 Wall. 591, 22 L. ed. 210.

[26] United States v. Paine Lumber Co., 206 U. S. 467, 51 L. ed. 1139, 15 Sup. Ct., Advance Sheets, 697, October Term, 1906.

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treaty and patented to them with the restriction that they should not sell, lease or in any manner alienate the land without the consent of the President of the United States, a patent, it is held, devests the United States notwithstanding the restriction of all title to the land or timber growing on the lands; nor, under such circumstances, is there any cause of action in the United States to recover the value of the timber cut from such allotments under an improvident contract made by the allottees and the purchaser.[27]

§ 382. Abandonment of possession by Indians.—The right of possession in the patentee of lands in the occupancy of Indians will vest immediately on the abandonment of such possession.[28] A patentee of land occupied by Indians takes it, however, subject to the right of such occupancy.[29] A purchaser from an Indian acquires only a mere right of possession.[30] And this right of possession may be modified by the United States at will.[31] While the right of possession may pass, the Indians have no capacity to pass the fee to lands occupied by them,[32] and consequently a deed from the Indians will convey no title.[33]

§ 383. Treaty-making power may dispose of government's title. The government's title to lands may be disposed of to Indians un-

[27] United States v. Auger, 153 Fed. 671. It had been held that lands allotted to Indians in severalty, subject to the conditions imposed by the general allotment act of 1887, declaring that the United States shall hold the allotted lands in trust for the allottee for twenty-five years, or so much longer as the President may determine, and then convey the same to such allottee or his heirs in fee, and that any conveyance or contract in relation to the same made before the expiration of the period specified shall be null and void, remained the property of the United States during the term of the trust, and consequently that the government might maintain an action for the timber unlawfully cut from such lands. United States v. Gardner, 133 Fed. 285, 66 C. C. A. 663. In view of the cases cited above, it may well be doubted if this case has not been overruled indirectly by them.

[28] Snell v. Railway Co., 78 Iowa, 94, 42 N. W. 590.

[29] Byrne v. Alas, 74 Cal. 635, 16 Pac. 526.

[30] Sparkman v. Porter, 1 Paine, 471, Fed. Cas. No. 7143.

[31] Caldwell v. Robinson, 59 Fed. 654.

[32] East Haven v. Hemingway, 7 Conn. 186, 198.

[33] Buck v. Holloway, 2 J. J. Marsh. 164; Breaux v. Johns, 4 La. Ann. 142, 50 Am. Dec. 557. See, also, Cornet v. Winton, 2 Yerg. (Tenn.) 145; Southampton v. Mecox Co., 116 N. Y. 7, 22 N. E. 389.

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der the treaty-making power without the consent of Congress.[34] In a word, the fee is in the United States, and the title of the Indian is but a right of occupancy.[35] Lands in California, which at the date of the treaty with Mexico were occupied by Indian tribes, became a part of the public domain, and subject to pre-emption, if no claim for them was presented by the occupants to the land commissioners within the time limited by the act of Congress.[36] Congress possesses the exclusive right of pre-emption to all lands lying in the territories of the United States.[37] The grant to the state of the sixteenth and thirty-sixth sections comprises such sections in the occupancy of Indians.[38]

§ 384. Indian nation not a foreign state.—The Constitution describes the judicial power as extending to controversies between a state and its citizens and foreign states, citizens or subjects, and the supreme court of the United States has original jurisdiction in cases in which a state shall be a party. The Cherokee Nation sought to obtain an injunction to prevent the execution of certain acts of the legislature of the state of Georgia in the territory of the Cherokee Nation in that state, claiming the right to proceed in the supreme court of the United States as a foreign state against the state of Georgia. That court decided that the Cherokees are a state, having been uniformly treated as such since the settlement of the United States, but that the condition of the Indians in relation to the United States was unlike that of and other two people in existence; and they could not be denominated foreign nations nor a foreign state within the meaning of the Constitution.[39]

[34] Mining Co. v. Dickert etc. Co., 6 Utah, 196, 21 Pac. 1007, 5 L. R. A. 267.

[35] Goodfellow v. Muckey, 1 McCrary, 244, Fed. Cas. No. 5537. Indians have only a possessory right in the lands occupied by them. Cherokee Nation v. Georgia, 5 Pet. 48, 8 L. ed. 42. The dominion exercised by Great Britain over Indians was transferred to the United States. State v. Foreman, 8 Yerg. (Tenn.) 256.

[36] Thompson v. Doaksum, 68 Cal. 595, 10 Pac. 200.

[37] Johnson v. McIntosh, 8 Wheat. 543, 5 L. ed. 681; Fleliher v. Peck, 6 Cranch, 142, 3 L. ed. 142. See, also, Roberts v. M. K. T. & R. R. Co., 43 Kan. 108, 22 Pac. 1008; Blecker v. Bond, 3 Wash. C. C. 542, Fed. Cas. No. 1534.

[38] Roberts v. M. K. & T. R. R. Co., 43 Kan. 108, 22 Pac. 1008.

[39] Cherokee Nation v. State of Georgia, 5 Pet. 1, 8 L. ed. 25.

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§ 385. General acts of Congress not applicable to Indians.—Indians are bound by acts of Congress applicable in terms to them.[40] But general acts of Congress are not considered as applying to Indians unless the language is clearly intended to include them.[41] The right of eminent domain may be exercised by the United States for the purpose of constructing a railroad across the land held by the Indians under treaty with the United States.[42] The laws of a state can have no operation or effect over Indians in their tribal relations.[43] But although the Indian title has not been relinquished, a state may extend its jurisdiction over a tract of Indian land within the borders of the state.[44]

The marriage of a white person to an Indian woman and his adoption into the tribe will, in suits between himself and other members of the tribe, confer exclusive jurisdiction on the tribal courts.[45] According to the treaty between the United States and the Cherokee Nation, a murder committed by an Indian within the jurisdiction of that nation is an offense against it and not against the United States, the fifth amendment not applying.[46]

§ 386. Indians becoming citizens.—A state has no power to regulate in any manner the social relations of an organized Indian tribe;[47] and an Indian cannot become a citizen of the United States without its consent and co-operation.[48] The courts of the United States have jurisdiction of a suit brought by the govern-

[40] United States v. Kagama, 118 U. S. 379, 6 Sup. Ct. Rep. 1111, 30 L. ed. 230.

[41] Elk v. Wilkins, 112 U. S. 100, 5 Sup. Ct. Rep. 44, 28 L. ed. 645.

[42] Cherokee Nation v. Kansas Ry. Co., 135 U. S. 653, 10 Sup. Ct. Rep. 970, 34 L. ed. 301.

[43] Kobogum v. Jackson Iron Co., 76 Mich. 507, 43 N. W. 605.

[44] Caldwell v. State, 1 Stew. & P. (Ala.) 327.

[45] Raymond v. Raymond, 83 Fed. 722, 55 U. S. App. 92, 28 C. C. A. 38.

[46] Talton v. Mayes, 163 U. S. 383, 16 Sup. Ct. Rep. 986, 41 L. ed. 197. The criminal laws of a state do not extend to tribal Indians living in a reservation. State v. Campbell, 53 Minn. 356, 55 N. W. 554, 21 L. R. A. 172. See, also, People v. Dibble, 16 N. Y. 221. But see unless prohibited by treaty or act admitting state, State v. Doxtater, 47 Wis. 284, 2 N. W. 241.

[47] United States v. Barnaby, 51 Fed. 23.

[48] United States v. Osborne, 6 Saw. 408, 2 Fed. 59. But see quaere in Elk v. Wilkins, 112 U. S. 119, 5 Sup. Ct. Rep. 49, 28 L. ed. 649.

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ment for the benefit of an Indian band which has not been recognized by the United States as constituting a tribal state.[49]

§ 387. **Policy of the United States.**—While the United States has power, it is not the policy of the government to disregard the occupancy of the Indians, and convey title and possession, notwithstanding the occupancy of the Indians has not been relinquished.[50] While the state has no right to tax the inhabitants of an Indian reservation,[51] it may tax lands held by Indians in severalty when they are not situated within any recognized Indian domain.[52] A state is not obliged to give effect to the laws of an Indian tribe by the rules of international comity.[53] An Indian cannot be considered a foreign subject so as to give him the right to sue in the federal courts,[54] nor when sued in the state court is he entitled to remove the cause to the federal courts.[55]

§ 388. **Effect of treaties with Indians.**—Under treaties giving exclusive jurisdiction over territory to an Indian nation, laws of a state providing for licenses to enter and occupy such territory are void.[56] The supreme court of the United States has jurisdiction to pass on the controversy, because the decision of the supreme court of the state upholding the legislation draws in question the effect of the treaty.[57] A state has no power to withdraw Indians from the operation of an act of Congress which provides for the regulation of the liquor traffic with them.[58] An Indian

[49] United States v. Boyd, 68 Tex. 580.

[50] Gaines v. Hale, 26 Ark. 183.

[51] Moore v. County Commissioners, 2 Wyo. 22.

[52] Blue Jacket v. Commissioners, 3 Kan. 299.

[53] Roche v. Washington, 19 Ind. 56, 81 Am. Dec. 378.

[54] Karrahoo v. Adams, 1 Dill. 346, Fed. Cas. No. 7614.

[55] Paul v. Chilsoquie, 70 Fed. 402.

[56] Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483.

[57] Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483.

[58] United States v. Holliday, 3 Wall. 407, 18 L. ed. 186; United States v. Boyd, 83 Fed. 554, 42 U. S. App. 637, 27 C. C. A. 592. The sale of liquor to an Indian is illegal. United States v. Shaw-Mux, 2 Saw. 365, Fed. Cas. No. 16,268; United States v. Osborne, 6 Saw. 407, 2 Fed. 59; United States v. Earl, 9 Saw. 82, 17 Fed. 77; United States v. Flynn, 1 Dill. 452, Fed. Cas. No. 15,124; United States v. Burdick, 1 Dak. 143, 46 N. W. 573; Renfrow v. United States, 3 Okla. 170, 41 Pac. 91.

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cannot separate from his tribe,[59] and the prohibition by Congress of the sale of liquors to Indians is constitutional.[60]

§ 389. **Recognition of executive department followed by courts.** The courts will follow the recognition of the existence of a tribal organization by the proper executive department.[61] A state law in violation of the terms of a treaty with Indians cannot be enforced.[62] A contract which is made in violation of a treaty with Indians and an act of Congress is void.[63]

§ 390. **Liberal construction of treaties.**—The language used in treaties with Indians should be liberally construed in their favor, and laws placing upon them liabilities or obligations should not be extended beyond their plain import. The property of Indians who are under the protection of treaties and the laws of Congress is withdrawn from the operation of state laws and is not taxable.[64] The proposition whether or not certain lands in the possession of an Indian chief and his descendants are under treaties exempt from taxation presents a federal question.[65] "These Indian tribes are the wards of the nation," said Mr. Justice Miller; "they are communities dependent on the United States; dependent largely for their daily food; dependent for

[59] United States v. Winslow, 3 Saw. 341, Fed. Cas. No. 16,742; Ex parte Byers, 32 Fed. 408; United States v. Certain Property, 1 Ariz. 40, 25 Pac. 520; People v. Sweetser, 1 Dak. 316, 46 N. W. 455; Compo v. Jackson Iron Co., 50 Mich. 583, 16 N. W. 300.

[60] United States v. Forty-three Gallons of Whisky, 93 U. S. 188, 23 L. ed. 846. But see United States v. Seveloff, 2 Saw. 317, Fed. Cas. No. 16,252, that certain laws relating to the sale of liquors to Indians do not extend to Alaska.

[61] United States v. Holliday, 3 Wall. 407, 18 L. ed. 182; Territory v. Cox, 6 Dak. 521; Me-shing-go-me-sea v. State, 36 Ind. 316; Brown v. Steele, 23 Kan. 675.

[62] In re Race Horse, 70 Fed. 610. It was held that the acts of the assembly of North Carolina incorporating the Eastern Band of Indians and confirming certain contracts were void. United States v. Boyd, 83 Fed. 554, 27 C. C. A. 592, 42 U. S. App. 637. The laws of Tennessee, however, came into full effect after the removal of the Chickasaws, subject to the rights secured by treaty. Love v. Pamplin, 21 Fed. 759.

[63] Uhlig v. Garrison, 2 Dak. Ter. 96, 2 N. W. 255.

[64] Blue Jacket v. Commissioners of Johnson Co. (The Kansas Indians), 5 Wall. 737, 18 L. ed. 667; Wan-Zop-E-Ah v. Board of Commissioners, 5 Wall. 760, 18 L. ed. 675.

[65] Wau-pe-man-qua v. Aldrich, 28 Fed. 497.

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their political rights. They owe no allegiance to the states and receive from them no protection; because of the local ill-feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with if the power. This has always been recognized by the Executive, by Congress, and by this court, whenever the question has arisen."[66]

§ 391. **May be controlled by legislation.**—The government of the United States, instead of dealing with the Indians by treaties, has the right and authority to control them by legislation, because they are within the geographical limits of the United States. It follows by necessary implication that Congress has power to legislate for their protection and for the protection of those with whom they come in contact. But as long as they maintain their tribal relations, the states possess no such power over them, because they are under no obligation of allegiance to a state, within which their reservation may exist, and, on the other hand, the state extends to them no protection.[67]

§ 392. **Technical meaning of treaties not to be considered.**—The words of a treaty may be construed to exclude the right of a state to sell Indian land for taxes,[68] and a treaty with Indians will be favorably construed with reference to their right to hunt.[69] In the construction of a treaty with Indians the object should be not to consider it according to the technical meaning of its words

[66] United States v. Kagama, 118 U. S. 375, 383, 6 Sup. Ct. Rep. 1109, 30 L. ed. 228.

[67] United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. Rep. 1109, 30 L. ed. 228; Choctaw Nation v. United States, 119 U. S. 27, 7 Sup. Ct. Rep. 90, 30 L. ed. 315; Wau-pe-man-qua v. Aldrich, 28 Fed. 497; In re Race Horse, 70 Fed. 605; Missouri River, Ft. S. & G. R. Co. v. Morris, 13 Kan. 316.

[68] Wau-pe-man-qua v. Aldrich, 28 L. ed. 497; Missouri River, Ft. S. & G. Co. v. Morris, 13 Kan. 316; Auditor General v. Williams, 94 Mich. 188, 53 N. W. 1100; The Kansas Indians, 5 Wall. 757, 18 L. ed. 673.

[69] In re Race Horse, 70 Fed. 605. That if an Indian has parted with his lands they are subject to taxation, see Peck v. Miami County Commissioners, 4 Dill. 370, Fed. Cas. No. 10,891.

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by learned lawyers, but to view it in the sense in which they would naturally be understood by the Indians. A treaty between the United States and an Indian tribe may be sufficient to grant title to individuals to parts of the lands of the tribe, without an act of Congress or patent from the executive authority of the United States, if such was the intention of the treaty.[70] No jurisdiction exists in the court of an action against the Choctaw Nation or its chief officers when sued in their official capacity for an alleged debt or liability of the nation, and when the judgment, if recovered, would operate against the nation.[71]

§ 393. Indian tribe not a sovereign nation.—Congress has the power to authorize the construction of a railroad through the territory of an Indian tribe, as such tribe is not a sovereign nation. The right of eminent domain can be exercised without its consent by the United States upon the making of just compensation to the owner.[72] For the purpose of determining who are the communal owners entitled to receive *per capita* compensation, the courts will follow Indian laws and customs so far as they create no conflict with the laws of the United States or with the purposes of the treaty or national law and justice.[73]

[70] Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. Rep. 1, 44 L. ed. 49.

[71] Thebo v. Choctaw Tribe of Indians, 66 Fed. 372, 13 C. C. A. 519.

[72] Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 641, 10 Sup. Ct. Rep. 965, 34 L. ed. 295. The court of claims has had occasion to pass upon many claims arising from Indian depredations. See Labade v. United States, 31 Ct. of Cl. 205; Janis v. United States, 32 Ct. of Cl. 407; Brown v. United States, 32 Ct. of Cl. 432; Friend v. United States, 29 Ct. of Cl. 495; Connor v. United States, 19 Ct. of Cl. 675.

[73] New York Indians v. United States, 40 Ct. of Cl. 448.

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CHAPTER XIII.

AMBASSADORS, CONSULS, CONSULAR COURTS AND FOREIGN JUDGMENTS.

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§ 456. Fees for prosecution of claim.
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§ 394. General comments.—It is not within the scope of this work to enter into a detailed examination of the rights and duties of ambassadors and consuls, but as the rights of these officers depend not only on the principles of international law, but also, frequently, on the provisions of treaties, a brief notice may not be inappropriate. It may be observed in passing that a foreign minister has the right to remonstrate with the executive to whom he is accredited upon any measure affecting his country. "But it will ever be denied as a right of a foreign minister that he should endeavor, by an address to the people, oral or written, to forestall a depending measure, or to defeat one which has been decided."[1] No communication can be received by the Department of State from the subjects of another country, except through the minister of that country.[2]

§ 395. Courts bound by recognition of President.—The courts are bound by the recognition given by the President to a foreign

[1] Mr. Randolph, Secretary of State, to M. Fauchet, French Minister, June 13, 1795, 8 MS. Dom. Let. 262.

[2] Mr. Monroe, Secretary of State, to Admiral Cochrane, April 5, 1815, MS. Notes to For. Legs., II, 80.

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minister, and they cannot inquire whether a person who is recognized by the government as the minister of a foreign power was duly appointed or not.[3] A certificate issued by the Secretary of State, under his seal of office, stating that a person has been recognized as a foreign minister by the Department of State, constitutes full evidence of the fact of his authorization and reception as such by the President of the United States.[4] It is deemed inadvisable for a diplomatic agent over his own signature to appeal to the press. The Department of State should be addressed if a foreign legation has any cause of complaint against the government or any person in its service.[5]

§ 396. **Proof by parol evidence.**—It is competent to prove by parol evidence the period during which a person was considered by the United States as a foreign minister.[6] The origin and support of the privileges of foreign ministers have their support in the law of nations.[7]

§ 397. **Appointment of ambassadors and consuls.**—By the Constitution of the United States the President is vested with the power of nominating, and by and with the consent of the Senate of appointing, ambassadors, other public ministers and consuls.[8] The Constitution also provides that "Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."[9] Under this clause Congress can confer power upon the President to appoint a vice-consul.[10] The word "consul," as used in the Constitution, does not include a subordinate and temporary officer like that of vice-consul. "Because the subordinate officer is charged with the performance of

[3] United States v. Ortega, Fed. Cas. No. 15,971, 4 Wash. C. C. 531; Torlade d'Azambuja v. Pereira, 1 Miles, 366.

[4] United States v. Benner, Fed. Cas. No. 14,568, Baldw. 234.

[5] Mr. Fish, Secretary of State, to Mr. Garcia, Argentine Minister, November 5, 1869, MS. Notes to Argentine Leg., VI, 78.

[6] United States v. Liddle, Fed. Cas. No. 15,598, 2 Wash. C. C. 205.

[7] Holbrook v. Henderson, 6 N. Y. Super. Ct. (4 Sand. 619.)

[8] Const., art. II, sec. 2.

[9] Const., art. II, sec. 2.

[10] United States v. Eaton, 169 U. S. 331, 18 Sup. Ct. Rep. 374, 42 L. ed. 767.

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the duty of the superior for a limited time, and under special and temporary conditions he is not thereby transferred into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform, under any circumstances or exigency, the duties of a superior officer, and the discharge of administrative duties would be seriously hindered."[11]

§ 398. **Citizen appointed diplomatic representive.**—The supreme court of the United States quotes with approval this language of Mr. Secretary Evarts: "This government objects to receiving a citizen of the United States as the diplomatic representative of a foreign power. Such citizens, however, are frequently recognized as consular officers of other nations, and this policy is not known to have hitherto occasioned any inconvenience." And again: "The usage of diplomatic intercourse between nations is averse to the acceptance, in the representative capacity, of a person who, while native-born in the country which sends him, has yet acquired lawful status as a citizen by naturalization of the country to which he was sent."[12] The court also approved the language of Mr. Secretary Bayard that: "It has long been the almost uniform practice of this government to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The statutory and jurisdictional immunities and the customary privileges of right attaching to the office of a foreign minister make it not only inconsistent, but at times even inconvenient, that a citizen of this country should enjoy so anomalous a position."[13] But there is no presumption of the alienage of the defendant from the mere fact that he is the consul in the United States of a foreign government.[14]

§ 399. **Privileges of ambassadors and ministers.**—Ambassadors and ministers represent their sovereign and are exempt from the jurisdiction of both civil and criminal laws.[15] But they will

[11] Mr. Justice White, in United States v. Eaton, *supra*.

[12] Ex parte Baiz, 135 U. S. 403, 10 Sup. Ct. Rep. 854, 34 L. ed. 222.

[13] Ex parte Baiz, *supra*.

[14] Bors v. Preston, 111 U. S. 252, 4 Sup. Ct. Rep. 407, 28 L. ed. 419.

[15] The Schooner Exchange v. McFaddon, 7 Cranch (U. S.), 116, 3 L. ed. 287; State v. De La Foret, 2 Nott & McC. 217; 1 Kent's Commentaries, 15.

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not be exempt from the operation of a mechanic's lien law as to any structure not used for purposes relating to their representative character.[16] A servant of a foreign minister is entitled to like protection.[17] Courts of law are obliged to accept the declaration of a foreign minister when his character as such has been established, as conclusive proof of his authority to maintain a suit on behalf of his government. A copy of his instructions cannot rightfully be demanded either by the courts or the government to which he is accredited.[18]

§ **400. Resignation as bar to certiorari.**—If an application is made to the supreme court of the United States for a writ of *certiorari* to direct an inferior court to certify an indictment on the ground that the accused was at the time of the filing of the indictment the political agent of a foreign government, the application will be denied when it appears that before the filing of the indictment he was requested by his government to resign and did resign, and nothing is shown by the records of the Department of State as to his relations to the United States except a denial to him of the privilege of a free entry of goods imported for his use.[19]

§ **401. Rights and privileges of consuls.**—A consul is merely a commercial agent. He is not entitled to demand the privileges and immunities that are attached to the person of a minister or ambassador.[20] A consul is not a judicial officer, and a passport executed by an American consul residing in a foreign country allowing a person to return from that country to the United States is not evidence that he has been in such foreign country.[21] He.

[16] Byrne v. Herran, 1 Daly (N. Y.), 344.

[17] Lockwood v. Coysgarne, 3 Burr. 1676; Novello v. Toogood, 1 Barn. & C. 562; Macartney v. Garbutt, 24 Q. B. D. 368.

[18] Mexico v. De Arangoiz, 5 Duer (N. Y.), 643.

[19] In re Heitz, 111 U. S. 766, 4 Sup. Ct. Rep. 698, 28 L. ed. 592. If a public minister commences an assault he cannot claim his privilege if he is assaulted in turn. United States v. Ortega, Fed. Cas. No. 15,971, 4 Wash. C. C. 531. But he may not be arrested on process. United States v. Benner, Baldw. (U. S.) 234, Fed. Cas. No. 14,568.

[20] 1 Kent's Commentaries, 44; Wheaton's Int. Law (Dana's ed.), sec. 249.

[21] Foster v. Davis, 1 Litt. (Ky.) 71.

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like other foreign residents that owe a temporary allegiance to the state, is subject to the local laws both in civil and criminal cases.[22] "The general principle is that a foreign consular officer is subject to no charge in the country of residence, by reason of his official capacity or acts; but that if such officer contracts private interests there, such as engaging in business, acquiring taxable property and the like, he is subject to the same rules as a private individual."[23]

§ 402. Contract made in official capacity.—But a consul-general is not personally liable, if he makes a contract in his official capacity for the benefit of his government.[24] "The character of consul does not give any protection to that of merchant, when they are united in the same person."[25] In all that concerns his trade, a trading consul is liable to ordinary process the same as a native merchant.[26] "Consuls are not public ministers. Whatever protection they may be entitled to in the discharge of their official duties, and whatever special privileges may be conferred upon them by the local laws and usages, or by international compact, they are not entitled by the general law of nations to the peculiar immunities of ambassadors."[27]

§ 403. Consular regulations of United States.—In the Consular Regulations of the United States it is stated: "Although consuls have no right to claim the privileges and immunities of diplomatic representatives, they are under the special protection of international law, and are regarded as the officers both of the state which appoints and the state which receives them. The extent of their authority is derived from their commissions and their exequaturs. It is believed that the granting of the latter instrument, without express restrictions, confers upon a consul

[22] Coppell v. Hall, 7 Wall. (U. S.) 553, 19 L. ed. 244; Wilcox v. Luco, 118 Cal. 639, 62 Am. St. Rep. 305, 45 L. R. A. 579, 50 Pac. 758, 45 Pac. 676; 1 Kent's Commentaries, 44; In re Iasigi, 79 Fed. 751; Gittings v. Crawford, Taney's Dec. (U. S.) 11, Fed. Cas. No. 5465.

[23] Mr. Frelinghuysen, Secretary of State, to Mr. de Struve, Russian Minister, April 21, 1884, MS. Notes to Russia, VII, 449.

[24] Jones v. Le Tombe, 3 Dall. 384, 1 L. ed. 647.

[25] Coppell v. Hall, 7 Wall. (U. S.) 553, 19 L. ed. 246.

[26] Scott v. Hobe, 108 Wis. 239, 84 N. W. 181.

[27] Wheaton's Int. Law, Dana's ed., sec. 249.

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all rights and privileges necessary to the performance of the consular office. Generally, a consul may claim for himself and his office not only such rights and privileges as have been conceded by treaty, but also such as have the sanction of custom and local laws, and have been enjoyed by his predecessors or by consuls of other nations, unless a formal notice has been given that they will not be extended to him."[28]

§ **404. Violation of criminal laws.**—If a foreign consul violates the criminal laws of the country in which he resides, he is liable to be punished to the same extent as other foreign residents.[29] While a consul may claim exemption from service on juries and in the militia,[30] yet American citizens holding foreign consulates in the United States are not, by the law of nations, exempt from jury duty or service in the militia.[31]

The consular regulations of the United States provides that the privileges of a consul engaging in business in the country of his official residence "are, under international law, more restricted, especially if he is a subject or citizen of the foreign state. If his exequatur has been granted without limitations, he may claim the privileges and exemptions that are necessary to the performance of the duties of his office; but in all that concerns his personal status, or his status as a merchant, it is doubtful whether he can claim any rights or privileges not conceded to other subjects or citizens of the state. He should, however, claim the same privileges and immunities that are granted to other merchant consuls in the same country."[32]

§ **405. In eastern countries.**—In countries non-Christian, the right of extraterritoriality exists to a large degree. This is due to the fact that these nations are not admitted to a full community of international law.[33] "In non-Christian countries the rights of extraterritoriality have been largely preserved, and

[28] Consular Regulations of the United States (1896), sec. 72, p. 27.

[29] Mr. Clayton, Secretary of State, to Mr. Calderon de la Barca, Spanish Minister, August 28, 1849, MS. Notes to Spain, VI, 187.

[30] Consular Regulations of the United States (1896), sec. 73, p. 28.

[31] Cushing, 8 Op. Atty. Gen. (1856) 169.

[32] Consular Regulations of the United States (1896), sec. 74, p. 29.

[33] Cushing, 7 Op. Atty. Gen. 342.

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have generally been confirmed by treaties to consular officers. To a great degree they enjoy the immunities of diplomatic representatives together with certain prerogatives of jurisdiction, the right of worship, and, to some extent, the right of asylum. These immunities extend to exemption from both the civil and criminal jurisdiction of the country to which they are sent, and protect their households and the effects covered by the consular residence. Their personal property is exempt from taxation, though it may be otherwise with real estate or movables not connected with the consulate. Generally, they are exempt from all personal impositions that arise from the character or quality of a subject or citizen of the country."[34]

§ 406. United States court for China.—In 1906 a United States court for China was created, with "exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China," except in so far as jurisdiction may be qualified by section 2 of the act creating the court.[35]

[34] Consular Regulations of the United States (1896), sec. 75, p. 29.

[35] 34 Stats. at Large, pt. 1, p. 814. Section 2 of this act provides: "The consuls of the United States in the cities of China to which they are respectively accredited shall have the same jurisdiction as they now possess in civil cases where the sum or value of the property involved in the controversy does not exceed five hundred dollars United States money and in criminal cases where the punishment for the offense charged cannot exceed by law one hundred dollars' fine or sixty days' imprisonment, or both, and shall have power to arrest, examine, and discharge accused persons or commit them to the said court. From all final judgments of the consular court either party shall have the right to appeal to the United States court for China: Provided, also, That appeal may be taken to the United States court for China from any final judgment of the consular courts of the United States in Korea so long as the rights of extraterritoriality shall obtain in favor of the United States. The said United States court for China shall have and exercise supervisory control over the discharge by consuls and vice-consuls of the duties prescribed by the laws of the United States relating to the estates of decedents in China. Within sixty days after the death in China of any citizen of the United States, or any citizen of any territory belonging to the United States, the consul or vice-consul whose duty it becomes to take possession of the effects of such deceased person under the laws of the United States shall file with the

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It is provided that the jurisdiction of this court, "both original and on appeal, in civil and criminal matters and also the jurisdiction of the consular courts in China, shall in all cases be exercised in conformity with said treaties and the laws of the United States now in force in reference to the American consular courts in China, and all judgments and decisions of said consular courts, and all decisions, judgments, and decrees of the United States court, shall be enforced in accordance with said treaties and laws. But in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions, and shall govern the same subject to the terms of any treaties between the United States and China."[36]

§ 407. What law to prevail.—By treaties with China, the United States obtained extraterritorial jurisdiction in civil controversies between American citizens residing in China, as to any

clerk of said court a sworn inventory of such effects, and shall as additional effects come from time to time into his possession immediately file a supplemental inventory or inventories of the same. He shall also file with the clerk of said court within sixty days a schedule under oath of the debts of said decedent, so far as known, and a schedule or statement of all additional debts thereafter discovered. Such consul or vice-consul shall pay no claims against the estate without the written approval of the judge of said court, nor shall he make sale of any of the assets of said estate without first reporting the same to said judge and obtaining a written approval of said sale, and he shall likewise within ten days after any such sale report the fact of such sale to said court, and the amount derived therefrom. The said judge shall have power to require at any time reports from consuls or vice-consuls in respect to all their acts and doings relating to the estate of any such deceased person. The said court shall have power to require where it may be necessary a special bond for the faithful performance of his duty to be given by any consul or vice-consul into whose possession the estate of any such deceased citizen shall have come in such amount and with such sureties as may be deemed necessary, and for failure to give such bond when required, or for failure to properly perform his duties in the premises, the court may appoint some other person to take charge of said estate, such person having first given bond as aforesaid. A record shall be kept by the clerk of said court of all proceedings in respect to any such estate under the provisions hereof."

[36] 34 Stats. at Large, pt. 1, p. 814, sec. 4.

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crime committed there by them. At the time that the act creating the court for China was enacted, the jurisdiction of consular courts was defined by the Revised Statutes in the following terms: "Jurisdiction in both civil and criminal matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries." [37]

§ 408. **Object of this court.**—In a recent case decided by the United States circuit court of appeals for the ninth circuit, it was stated that in creating this court, the object of the treaty and the intention of Congress, in so far as its criminal jurisdiction is concerned, was "to throw around American citizens residing or sojourning in China, and there charged with crime, the beneficient principles of the laws of the United States relating to the trial of persons charged with crimes—the rules of evidence, the presumption of innocence, the degree of proof necessary to convict, the right of the accused to be confronted with witnesses against him, exemption from being compelled to criminate himself, etc. But while securing to them these privileges, the statute at the same time made them subject to punishment for acts made criminal by any law of the United States, or for acts recognized as crimes under the common law." [38]

§ 409. **Common law in force.**—In that case the court had occasion to consider the date at which the common law in existence should be considered as the common law binding the court, and reached the conclusion that Congress had reference to the common law in force in the several American colonies at the date of the separation from the mother country, including not only the

[37] Rev. Stats., sec. 4086.
[38] Biddle v. United States, 156 Fed. 759.

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ancient common law, the *lex non scripta*, but also the statutes which had before this date been passed for the purpose of amending or aiding the common law. The court adopted the language of Judge Cooley: "The colonies also had legislatures of their own, by which laws had been passed which were in force at the time of the separation, and which remained unaffected thereby. When, therefore, they emerged from the colonial condition into that of independence, the laws which governed them consisted, first, of the common law of England, so far as they had tacitly adopted it as suited to their condition; second, of the statutes of England, or of Great Britain, amendatory of the common law, which they had in like manner adopted; and third, of the colonial statutes. The first and second constituted the American common law, and by this in great part are rights adjudged and wrongs redressed in the American States to this day." [39]

§ 410. **Obtaining money under false pretenses.**—A person was convicted in this court of obtaining money under false pretenses, and it was claimed on appeal that this act was not an offense at common law, and was not made a crime by the laws of the United States. The court said that this particular kind of cheating was not criminal under the ancient common law, but was first so declared in 1757 by statute.[40] Congress has made it a crime in the territory over which the United States exercises exclusive jurisdiction to obtain money under false pretenses.[41] It is also provided: "That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction in a

[39] Cooley's Constitutional Limitations, 25. It also quoted the language of Mr. Bishop: "The rule is familiar to the legal profession, that colonists to an uninhabited country carry with them the laws of their mother country, as far as applicable to their new situation and circumstances; and that, in their new home, the laws thus taken with them, whether in the mother country they were written or unwritten, are regarded as unwritten, or common law." 1 Bishop's Criminal Law, sec. 155.

[40] 30 Geo. II, c. 24; 2 Bishop's Crim. Law, sec. 392; 19 Cyc. 387.

[41] 31 Stats. at Large, 1326, 1327.

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circuit or district court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purposes; and no subsequent repeal of any such State law shall affect any such prosecution."[42] At the time that the act referred to was passed, most of the states of the Union made it a crime to obtain money or goods by false pretenses, and hence, in all places in such states over which the United States exercises exclusive jurisdiction, this act would, if there committed, be a crime against the United States. The court said that in view of these statutes its conclusion was that "obtaining money or goods under false pretenses is an offense against the laws of the United States, within the meaning of the statute conferring jurisdiction upon the United States Court for China, and that an American citizen guilty of the commission of such an act in China is subject to trial and punishment therefor by that court."[43] But the court held that the false representation alleged as constituting the false pretense must be of some past or existing fact. A representation of an act to occur in the future is not sufficient.

[42] 30 Stats. at Large, 717. See, also, Rev. Stats., sec. 5391. For an application of this provision, see Sharon v. Hill, 24 Fed. 731; United States v. Wright, Fed. Cas. No. 16,774; United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. Rep. 746, 38 L. ed. 631.

[43] Biddle v. United States, *supra*. While this decision clearly states the jurisdiction of the court and defines the common law which prevails, the court held that the information upon which the defendant was convicted did not state facts sufficient to constitute the offense of obtaining money under false pretenses. On this point it said: "The information, so far as is necessary to be here set out, charges that the defendant 'on or about the 31st day of October, 1906, in Shanghai, China, unlawfully and knowingly did falsely pretend to Woo Ah Sung, Zung Yu Young, Ng Sih Yiek and Sz Yung, that the municipal authorities of the International Settlement of Shanghai, China, would allow and permit in the building known as Nos. 4 and 5 Mohawk Road, Shanghai, China, ... Chinese gambling games to be played during the Autumn Race Meeting of 1906, in Shanghai, China, which pretenses were false as the said C. A. Biddle then and there well knew, and by said false pretenses the said C. A. Biddle, with intent to defraud, unlawfully did obtain from the said Woo Ah Sung, Zung Yu Dong, Ng Sih Yiek and Sz Yung the sum of Tls. 3000.00 Shanghai Sycee as rent

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§ **411. Suits against consuls.**—Under the Constitution of the United States the supreme court possesses original jurisdiction

for the said premises to be used for the said gambling games."

It will be noticed that the alleged false pretenses relate wholly to some future action of the municipal authorities of the International Settlement of Shanghai, in permitting Chinese gambling to be played during the Autumn Race Meeting of 1906, in Shanghai. There is no averment that defendant made any false representation as to any existing fact, or past fact, and without such an averment the charge of obtaining money under false pretenses cannot be sustained. In order to constitute the crime of obtaining money under false pretenses, the alleged false representation must be of some past or existing fact. Says Mr. Bishop, section 401, volume 2, in his work on Criminal Law, third edition: "Both in the nature of things, and in actual adjudication, the doctrine is, that no representation of a future event, whether in the form of a promise or not, can be a pretense, within the statute; for the pretense must relate either to the past or the present."

This statement is well sustained by decided cases. People v. Miller, 169 N. Y. 339, 88 Am. St. Rep. 546, 62 N. E. 418; Cook v. State, 71 Neb. 243, 98 N. W. 810. Our attention has not been called to any case which holds to the contrary. People v. Wasservogel, 77 Cal. 173, 19 Pac. 270, which is cited by the learned attorney for the United States, is in harmony with the rule as we have stated it. In that case the defendant obtained money upon a draft drawn by him, he falsely stating at the time that he had credit with the firm upon which it was drawn, for the amount of the draft, and that the draft would be honored. In that case, it will be perceived, there was the false representation of an existing fact, and the court, in its decision upholding the conviction in that case, said: "It is true that to come within the statute, a representation must be of some fact, past or present; but the statement of the defendant that he had credit with the firm named for the amount of the draft, and that the firm would honor the draft, when he knew that he had no credit with the firm, and that the draft would not be honored or paid, was sufficient."

Passing from the information to a consideration of the evidence: It was wholly insufficient to justify the conviction of defendant. It appears that on May 29, 1906, the defendant in his own name, but in fact acting for the Hotel Metropole Company, Limited, entered into a contract with the firm composed of the Chinese named in the information, whereby the defendant, "let during the four days of the autumn race meeting of 1906, the whole of the second floor and verandah of the building Nos. 4 and 5 Mohawk Road, for the purpose of running Chinese tables for the sum of taels six thousand—Tls. 6,000—fifteen hundred taels of which to be paid on the signing of the contract by the said Yik Che as bargain money, the balance to be paid on or before the first day of November, 1906. This contract to be null and void should the municipal authorities prohibit the running of the said building as a Chinese grand stand

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in all cases affecting ambassadors and consuls.[44] But while jurisdiction thus exists, it is not exclusive, and Congress is not prohibited from conferring jurisdiction upon subordinate courts of the United States.[45] At one time, under the statutes of the United States, state courts had no jurisdiction in suits against consuls.[46] This was because the statutes made the jurisdiction exclusive. This subject is more fully discussed in a succeeding section.

during said race meeting and the above mentioned fifteen hundred taels bargain money be returned to the said Yik Che."

It is very clearly shown by the evidence that when the payments were made under this contract, the parties knew that gambling was not then permitted in Shanghai, and would not be during the approaching Autumn race meeting of 1906, unless the municipal authorities should in some manner remove the prohibition. There was also some evidence tending to show that the council had refused, before the making of the above lease, to give its consent to the suspension of the ordinance against gambling in Shanghai, and that this fact was known to the defendant and not communicated by him to the lessees; and that he and others were endeavoring to get the council to recede from its position against gambling, during the time the several payments were made under this lease; but there was no evidence that defendant ever made any expense or implied representation that the ordinance against gambling had been repealed or suspended; there was no false representation of any existing fact." Holding this view, the court reversed the judgment, with directions to discharge the defendant.

In another case appealed from the same court the appellate tribunal held that an unloaded pistol, when there is no attempt to use it otherwise than by pointing it in a threatening manner at another, is not a dangerous weapon. Price v. United States, U. S. Cir. Ct. App., 9th Circuit, November 5, 1907.

[44] Const., art. III, sec. 2.

[45] Gittings v. Crawford, Taney's Dec. (U. S.) 11, Fed. Cas. No. 5465; St. Luke's Hospital v. Barclay, 3 Blatchf. (U. S.) 259, Fed. Cas. No. 12,241; Graham v. Stucken, 4 Blatchf. (U. S.) 50, Fed. Cas. No. 5677; Bors v. Preston, 111 U. S. 252, 4 Sup. Ct. Rep. 407, 28 L. ed. 419.

[46] McKay v. Garcia, 6 Ben. (U. S.) 556, Fed. Cas. No. 8844; Sartori v. Hamilton, 13 N. J. L. 107; Mannhardt v. Soderstrom, 1 Binn. (Pa.) 138; Valareno v. Thompson, 7 N. Y. 576; Griffin v. Dominguez, 2 Duer. (N. Y.) 656; Commonwealth v. Kosloff, 5 Serg. & R. (Pa.) 545; Davis v. Packard, 7 Pet. (U. S.) 276, 8 L. ed. 684; Sagory v. Wisseman, 2 Ben. 240, Fed. Cas. No. 12,217; Durand v. Halbach, 1 Miles (Pa.), 46; Naylor v. Hoffman, 22 How. Pr. 510; Dupont v. Pichon, 4 Dall. 321, 1 L. ed. 851; Miller v. Van Loben Sels, 66 Cal. 341, 5 Pac. 512.

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§ 412. **Exemption under such statutes not waived by failure to plead.**—This exemption, when expressly conferred by statute, is not a personal privilege, and is not waived if the defendant fail to plead it, as he may take advantage of the exemption in the appellate court for the first time.[47] "It is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations, and our Constitution and law seem to put consuls on the same footing in this respect. If the privilege or exemption was merely personal, it can hardly be supposed that it would have been thought a matter sufficiently important to require a special provision in the Constitution and laws of the United States. Higher considerations of public policy doubtless led to the provision. It was deemed fit and proper that the courts of the government, with which rested the regulation of all foreign intercourse, should have cognizance of suits against the representatives of such foreign governments."[48] But a consul may sue in a state court.[49]

§ 413. **Reclamation assessment.**—The statute of California permits a reclamation district to commence a suit to determine the validity of an assessment levied for the reclamation of swamp lands. This action is not an action *in personam*, and while it is not strictly a proceeding *in rem*, it partakes of its nature. Its purpose is to test the legality of the assessment and to enable the owner to present his objections to its validity at a hearing in advance of an action upon the assessment. It is a process of law, and constitutes one of the means by which the lien upon the property in the district is established. A defendant who owns property in the district and who is a foreign consul cannot, in such a proceeding, plead his consular privilege in bar.[50]

§ 414. **Concurrent jurisdiction with state courts.**—The courts of the United States originally had exclusive jurisdiction of all suits or proceedings against consuls, but while Congress has the

[47] Miller v. Van Loben Sels, 66 Cal. 341, 5 Pac. 512; Valareno v. Thompson, 7 N. Y. 576; Davis v. Packard, 7 Pet. 276, 8 L. ed. 684.

[48] Davis v. Packard, 7 Pet. 276, 8 L. ed. 684.

[49] Sagory v. Wissman, 2 Ben. (U. S.) 240, Fed. Cas. No. 12,217.

[50] Reclamation District No. 551 v. Runyon, 117 Cal. 164, 49 Pac. 131.

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power to declare that such jurisdiction shall be exclusive, it may also declare the extent to which the state courts may exercise concurrent jurisdiction, as also at what stage of the proceedings the jurisdiction of the federal courts may attach in cases originally instituted in the state courts. In the section of the Revised Statutes as originally enacted the jurisdiction vested in the courts of the United States in all suits or proceedings against ambassadors, or other public ministers, or against consuls or vice-consuls, was made exclusive. But by the amendment of 1875 this particular subdivision was stricken out, and since that date no express declaration has been made in the statutes of the United States that the jurisdiction of the federal courts against a consul is exclusive of the state courts. By this amendment, "removing from the statutes the express provision that the jurisdiction of the federal courts in suits or proceedings against consuls should be exclusive of the courts of the several states," Songress must have intended to declare that such jurisdiction should no longer be exclusive, unless it is made exclusive either by the Constitution itself or by other existing legislation. There is, however, as above seen, no express declaration by Congress that such jurisdiction is exclusive, but it must be conceded that a consul who has been recognized by the President and admitted to the exercise of his official functions shall not, so long as he continues in the exercise of those functions, be deprived of the benefits of the provision in the Constitution extending the judicial power of the United States to all cases in which he is affected, and that unless there is some law by which he may invoke this judicial power for the purpose either of removing the cause into the courts of the United States before judgment, or to review the judgment of the state court, a state court can have no jurisdiction to entertain an action in which he is a defendant. Under this provision of the Constitution he is entitled to invoke the exercise of that power in any case to which he may be a party, and, if Congress has made any provision by which he can avail himself of this right, he is amply protected in the enjoyment of this provision of the Constitution. The Constitution does not declare that he shall be exempt from the jurisdiction of the state courts, but that the judicial power of the United States shall extend to all cases affecting him. It is for Congress to determine the mode and time at which he may invoke this jurisdiction, and if that body has provided a means

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by which he can avail himself of this judicial power, he is not deprived of any right given him by the Constitution."[51]

§ 415. **Right may be waived.**—Under this view allowing concurrent jurisdiction a consul sued in a state court, in addition to any defense he possesses to the cause of action, may claim his right under the Constitution to have the matter determined by the courts of the United States, and in case judgment is rendered against him, he can have the judgment reviewed by the supreme court of the United States.[52] But he may waive this right either by merely pleading his defense to the cause of action without invoking this provision of the Constitution, or by suffering default, and if he so waives it, he cannot, after the rendition of judgment against him, claim the right to review the judgment under a writ of error to the supreme court of the United States.[53]

§ 416. **Compulsory attendance of consuls as witnesses.**—In certain conventions with foreign powers consuls are exempt from the obligation of appearing as witnesses. In 1854 an indictment was found in the district court of the United States against the Mexican consul at San Francisco for a violation of the neutrality act in enlisting or hiring persons to enlist as soldiers in the service of Mexico. M. Dillon, the French consul at San Francisco, one of the witnesses for the defense, was served with a subpoena *duces tecum*, but when the witnesses were called in court he was not present. The return upon the subpoena showed that it had been served, and the counsel for the defendant asked that an attachment issue against the absent consul, which was done and the consul was brought into court.

§ 417. **Consular convention with France.**—By the second article of the consular convention between the United States and France of February 23, 1853, it was provided that consuls should never be compelled to appear as witnesses before the courts, but

[51] Wilcox v. Luco, 118 Cal. 639, 62 Am. St. Rep. 305, 50 Pac. 758, 45 L. R. A. 579. See, also, Börs v. Preston, 111 U. S. 261, 4 Sup. Ct. Rep. 407, 28 L. ed. 419; De Give v. Grand Rapids Furniture Co., 94 Ga. 605, 21 S. E. 582; In re Iasigi, 79 Fed. 751.

[52] Wilcox v. Luco, 118 Cal. 639, 62 Am. St. Rep. 305, 50 Pac. 758, 45 L. R. A. 579.

[53] Wilcox v. Luco, *supra*.

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that in cases where their testimony is desired, they shall be invited in writing to appear in court and give it, and if they are not able to do this, a request shall be made that they give it in writing, or that it be taken orally at their residence. By the third article of this convention it is provided that the consular offices and dwellings shall be inviolable, and that under no pretext shall the local authorities invade them, or examine or seize the papers that may be deposited in them. It was stated by M. Dillon that the paper which it was sought to have him bring with him must, if it existed, have been a part of the archives of his consulate.

§ 418. **Sixth amendment to Constitution.**—The sixth amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor. It was contended by the accused that this right is sacred, and secured to him by the Constitution of the United States; that it is comprehensive and without exception, and that neither by the provisions of any law or of any treaty can he be deprived of the right of compelling the attendance of any person whose testimony may be material to his defense. It was admitted by the counsel for the French consul that if the Constitution secured this right to the accused, no treaty could deprive him of it, and that if the court was called upon to decide between allowing a constitutional right to a prisoner and disregarding a treaty stipulation, or denying the constitutional right and observing the treaty, its highest allegiance was to the Constitution. The court held, however, that this provision of the Constitution did not authorize the issuance of such process to ambassadors, who, by public law, were not amenable to the laws of the country to which they were accredited, or to consuls, who, when a treaty expressly so stipulated, were likewise not amenable to the process of the courts. The court also held, that where a person sought a subpoena *duces tecum*, it was the duty of the court to require him to show that the document desired was not an official paper which the law protected from examination and signature.[54]

§ 419. **Diplomatic action.**—In addition to the controversy in court, the incident became the subject of diplomatic considera-

[54] In re Dillon, 7 Saw. 561, 7 Fed. Cas. No. 3914.

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tion. The French consul took down the consular flag on the service of the attachment, and the French Minister at Washington protested that the acts of the authorities constituted a gross disrespect to France, which considered the issuance of the attachment not only as a violation of the terms of the treaty, but also as a breach of international law, and that the subsequent discharge of the consul did not atone for this disrespect. The French Minister contended also that the *duces tecum* clause in the subpoena involved a violation of the archives of the consulate. Mr. Marcy, who was Secretary of State, insisted that the provisions of the Constitution of the United States assuring to the accused an opportunity to meet the witnesses produced against him was superior to any treaty in conflict with it, except in cases where such treaties contain exceptions to this right, which were recognized as such at the time of the adoption of the Constitution.

§ 420. **Distinction as witnesses between ambassadors and consuls.**—When the Constitution became effective, Mr. Marcy contended, compulsory process could not be served on ambassadors and ministers to appear as witnesses, and the clause in the Constitution, he said, did not give to the defendant in criminal prosecutions the right to compel their attendance in court. But this privilege as to ambassadors did not, Mr. Marcy argued, apply to consuls, who could only procure the privilege when given to them by treaty. A treaty, however, he maintained, in criminal cases was subject to the limitations of the Constitution of the United States. He offered, in a letter addressed to the American Minister to France, to compromise the controversy by a salute to the French flag upon a French warship then anchored in the bay of San Francisco, but the French Minister at Washington asked also that when the consular flag was rehoisted at San Francisco a salute should be paid to it. This Mr. Marcy declined to do, and finally the French government signified its willingness to accept as a sufficient satisfaction an expression of regret on the part of the United States, and that whenever a French national ship or squadron should appear in the bay of San Francisco "the United States authorities there, military or naval, will salute the national flag borne by such ship or squadron with a national salute, at an hour to be specified and agreed on with

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the French naval commanding officer present, and the French ship or squadron whose flag is thus saluted will return the salute gun for gun."[55]

§ 421. **Good excuse to be shown.**—The consular convention with France of 1853, while it provided that consuls should not be forced to appear as witnesses before the courts, yet made it their duty, if they are invited in writing to appear and testify, to do so unless they are unable to comply with the request. Mr. Marcy said that this duty would be violated where a consul refused to appear without a good and substantial excuse. "Neither his official character, his disinclination, nor any slight personal inconvenience constitutes such an excuse. The pressure and importance of official duties requiring immediate performance may prevent his attendance in court, but such can very rarely be the case where the court sits at the place of his residence. It is not claimed that the court can entertain the question of the competency of his excuse for declining to comply with its invitation; but where the government of the United States has fair grounds to question the good faith with which the consul avails himself of the provision of the convention which exempts from compulsory process, it has two modes of redress, and it can take either at its option. It can appeal to the consul's government to inquire into the case in this respect, and to deal with him as it shall find his conduct deserves; or it can revoke his exequatur."[56]

§ 422. **Subpoena in behalf of prosecution.**—An indictment was filed charging the defendant with having fitted out and with arming a vessel to be employed in the service of insurgents against the government of Chile. The counsel for the United States caused a subpoena to be served upon the vice-consul to appear as a

[55] Mr. Marcy, Secretary of State, to Mr. Mason, Minister to France, May 30, 1854, June 8, 1854, July 14, 1854, September 11, 1854, December 13, 1854, January 18, 1855, M. S. Inst. France, XV, 192, 198, 202, 210, 241, 249. Annual message of President Pierce, December 4, 1854. The contention of Mr. Marcy as to the effect of the constitutional amendment was not accepted by the French government. Mr. Fish, Secretary of State, to Mr. Bassett, October 18, 1872, M. S. Hayti, I, 267.

[56] Mr. Marcy, Secretary of State, to Mr. de Trangiere, Portuguese chargé d'affairs, March 27, 1855 Notes to Portugal, VI, # 145.

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witness. He appeared in obedience to the subpoena, and presented his exequatur recognizing him as the duly appointed vice-consul of Chile at San Francisco, and also the consular instructions of his own government, prohibiting him without authorization from the Minister of Foreign Affairs, or the respective legations, from making public the correspondence which he held with the government, or information which he might receive while exercising his charge. These instructions required consuls to demand the privileges and exemptions which may appertain to them by virtue of treaties or conventions entered into between Chile and the nation to which they may be accredited, and if there should be no treaty, to demand the privileges and exemptions which are generally accorded in the country of their residence to consuls of other nations. They were required to demand, as essential to the exercise of their office, the inviolability of their archives and documents, and freedom in all that they might do in their capacity of consuls. The demand of the vice-consul to be relieved from further attendance as a witness was based upon the ground that his privileges as vice-consul exempted him from compulsory process to attend as a witness in any court of the United States, and also that the circumstances of the case before the court rendered it improper that he should be required to attend as a witness on the part of the prosecution.

§ **423. Contention of the government.**—It was contended by the United States that the privileges asserted by the vice-consul did not exist, and that upon the overthrow of the government by which he was accredited, his office ceased. On this point the court ruled that the recognition of representatives of foreign countries is a matter for the executive department of the government, whose action must be accepted by the judicial department, but accepting him as the duly authorized and acting consul of the Chilean government, the court asked: "Does his position as such, of itself, entitle him to exemption from compulsory process to attend as a witness in the courts of the United States?" It stated that by the laws of nations, consuls and vice-consuls stand on a different footing from ambassadors and ministers. It examined the case of Dillon,[57] and said that the provision of

[57] 7 Saw. 561, Fed. Cas. No. 3914.

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the Constitution invoked in that case was not involved, because the vice-consul of Chile was not subpoenaed as a witness for the defendants, but on behalf of the prosecution, and that as he was entitled to the same privileges and immunities as are granted to the consuls of France, it would seem to follow that he was exempt from compulsory process to attend as a witness.

§ 424. **Insurgent government becoming established.**—But the court said there was another reason why his attendance should not be compelled. The defendants were charged with a violation of the neutrality laws of the United States, and their offense consisted in giving aid to those who, at the time the matter was before the court, constituted the established and recognized government. As they had succeeded and become recognized, the acts of that government from the commencement of its existence should be upheld as those of an independent nation. "To require the representative of that government," said the court, "to appear and give testimony against those alleged to have aided its establishment would not only be contrary to the principle upon which neutrality laws are based, but would strongly tend to give grave offense to the government now recognized by the United States, and with which this government, happily, is at peace."[58]

§ 425. **Subpoena by a state court.**—The Danish vice-consul at New York refused to obey a subpoena *duces tecum* issued by a state court, and in reply to a complaint Mr. Olney referred to the tenth article of the consular convention between the United States and Denmark, declaring that the archives of consulates are inviolable, and that a magistrate has no right under any pretext to seize or interfere with them, and said: "A state court has no jurisdiction of writs against a foreign consul, such jurisdiction being specifically reserved to the federal courts."[59]

§ 426. **Archives privileged.**—All documents which form a part of the archives of a foreign consulate are privileged. A witness, therefore, cannot be compelled to disclose their contents. The

[58] United States v. Trumbull, 48 Fed. 94.

[59] Mr. Olney, Secretary of State, to Messrs. Martin & Weil, November 13, 1896, 213, MS. Dom. Let. 673. See U. S. Rev. Stats., secs. 563, 687, 688, 711.

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privilege is that of the government and not of the witness. A circuit court of the United States of one district, issuing a subpoena by which a witness has been brought before an examiner to testify in a suit that is pending in another district, has authority to strike out from the testimony given by him anything violative of the privilege of a foreign government in disclosing the contents of documents belonging to the records of its consulate, where this privilege was claimed and sustained after the witness had, through inadvertence in some of his answers, violated the privilege.[60]

§ **427. American consuls as witnesses.**—Some cases have occurred where American consuls abroad have been subpoenaed to testify under conditions not in compliance with consular conventions. In one instance, Mr. Guenther, consul-general of the United States at Frankfort-on-the-Main, received a subpoena containing this clause: "Witnesses who do not appear without sufficient excuse are to be sentenced, according to paragraph 50 of the Penal Code, to pay the costs occasioned by such nonappearance, also to a fine not to exceed 300 marks; and if this is not paid, to imprisonment not to exceed six weeks—producing them by arrest is also admissible." The consul-general indicated in a note to the court his willingness to testify in case a proper request was made, but protested against the language used in the subpoena, threatening him in case he failed to appear with fine and imprisonment and eventual arrest.

§ **428. Instructions of Department of State.**—The correspondence on the subject was forwarded to the Department of State, which instructed the American Embassy at Berlin that it appeared that the consular convention did not stipulate for an exemption from summons, and hence it could not be claimed unless it should be ascertained that the consul-general was entitled to it under the most favored nation clause. But it was also said that as by the third article of the convention the consul-general, who was not a German subject, enjoyed "personal immunity from arrest or imprisonment except in case of crime," it appeared that the threat of fine, arrest and imprisonment was not only gratuitous, but that it showed a lack of respect due from one

[60] Kessler v. Best, 121 Fed. 439.

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friendly government to the consular officer of another, and that if it should have been carried into execution, would have constituted a flagrant violation of the treaty. He was required by the subpoena to testify "from papers to be shown" whether a certain person was an American citizen. This, the Department of State said, evidently referred to those belonging to the consular archives, and seemed to violate the article of the convention which declares that such archives should be inviolable. The German court, in reply to the protest of the consul-general, sent him a polite letter, in which he was requested to appear and give his testimony, adding that the summons was, through error, made out in the usual form. He complied with this request, testified, the officials verbally apologized, stating that they had not known of the consular convention, and the Department of State expressed its gratification "with the satisfactory termination of the incident."[61]

§ 429. **Other instances.**—Questions were, in 1899, addressed to Mr. Clancy, the consular agent of the United States at Bluefields, by Colonel Torres, who was conducting a military court of inquiry relative to the revolutionary uprising during the month preceding. These questions related to the action of the consular agent in issuing at the commencement of the uprising a warning to Americans to preserve a strict neutrality, and also as to his attitude and that of an American war vessel toward the revolutionary authorities, and as to the action of several Americans. These questions Mr. Clancy refused to answer without the permission of his official superiors. The treaty between the United States and Nicaragua then in force provided that the diplomatic agents of the United States should enjoy, according to the strictest reciprocity, the same privileges, exemptions, and immunities

[61] For. Rel. 1899, 302, 305. Mr. Hay, Secretary of State, in a note to Mr. White, American Ambassador to Germany, said: "While Mr. Guenther's [American consul-general] office and dwelling are inviolable, he is threatened with arrest and imprisonment outside, or by virtual imprisonment inside, his office and dwelling, if he fails to obey the process, either by arresting him outside of his dwelling and office or inside thereof; or if it is not sought to arrest him outside, virtually imprison him within by making it impossible for him to go out without being subject to arrest and imprisonment." March 6, 1899, For. Rel. 1899, 302.

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granted to the diplomatic agents and consuls of the most favored nations.

§ 430. **Instructions of Mr. Hay, Secretary of State.**—Mr. Hay instructed Mr. Sorsby, the United States consul at San Juan del Norte, who reported the facts, to determine what immunities, exemptions, and privileges are accorded by Nicaragua by treaty with Spain, Great Britain, or any other nation, to the consuls of such nation; and to claim for Mr. Clancy whatever exemption, privilege, and immunity may be accorded to such consuls.

Mr. Hay stated that as a general rule of international law, in the absence of treaty stipulation, consuls are not, as such and in general, entitled to all immunities which attach to a diplomatic representative. But he added: "The consular archives are, however, inviolable under all circumstances. They can neither be invaded nor searched, nor seized by the officers of justice or other authority; but the personal books and papers of the consul are not entitled to such immunity. He cannot be required to divulge information which came to him in his official capacity, for that is the exclusive property of his government; but as to matters which come within his knowledge or observation in his mere capacity as an individual, he is not privileged from testifying as a witness."

§ 431. **Facts within personal knowledge of consul.**—Mr. Hay, in defining the rights and obligations of a consul, declared that if a consul should himself take part in the commission of crime, or in inciting an insurrection, or should observe others doing so, against the government to which he was accredited, he could not be shielded from giving evidence, according to the forms of the local law, as to the facts acquired by him in this manner, and within his personal knowledge. "On the one hand," he said, "he is entitled to enjoy all the privileges necessary to enable him to discharge the duties of his office; on the other hand, he is not to refuse to testify, under the circumstances and limitations above stated, simply because the facts to which he is required to testify might be of a political character, or simply because his testimony might have a tendency to implicate American citizens or others in the commission of unlawful acts."[62]

[62] For. Rel. 1899, 566-568.

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§ 432. **Evidence before courts-martial.**—Mr. Merry, American Minister to Nicaragua, stated in the case mentioned that he had arrived at the conclusion that such evidence could not properly be given before a court-martial, and that the English vice-consul took the same ground, and refused to testify. The matter was dropped without seeking further to compel the consular agent to testify, and, according to Mr. Merry, "the precedent is now established that before courts-martial in Central America ministers and consular officers need not testify—a position which I respectfully suggest may be of importance hereafter."[63]

§ 433. **Information received in official capacity.**—Where it was sought to subpoena a consul-general to testify as to statements made to him, the Department of State said that he received the information in his official capacity, and communicated such information to the Department, thus making it a part of the records of the consulate, and therefore the Department could not authorize him to testify, because whatever knowledge he might possess was official and privileged, concerning only his relation to his own government.[64]

§ 434. **International law part of the law of United States.**—International law is a part of the law of the United States, and as often as cases arise depending upon the principles of international law for their determination, courts of appropriate jurisdiction must ascertain and administer it. If there be no treaty on the subject, and if there appear to be no controlling executive or legislative act or judicial decision, the court must consider the customs and usages of civilized nations, and may consult as evidence of these the works of jurists and commentators, not for the opinions that may be expressed by them as to what should be the law, but as reliably stating what the law actually is.[65] As said by Chancellor Kent: "In the absence of

[63] Mr. Merry to Mr. Hay, May 9, 1899, For. Rel. 583; For Rel. 1899, 563, 567, 568.

[64] Mr. Rockhill, Third Assistant Secretary of State, to Mr. Mason, U. S. Consul, July 31, 1894, For. Rel. 1899, 304.

[65] The Paquete Habana, 175 U. S. 677, 20 Sup. Ct. Rep. 290, 44 L. ed. 320; Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40 L. ed. 95; United States v. La Jeune Eugenie, 26 Fed. Cas. No. 15,551, 2 Mason 409.

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higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law."[66] Speaking of text-writers of authority on international law, Mr. Wheaton observes: "They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles."[67]

§ **435. Reciprocity in foreign judgments.**—In many of the states of the Union provision is made by statute or code of procedure as to the effect of foreign judgments. But where no such provision is made, the question must be solved by the principles of international law, and where the matter is not regulated by treaty, the effect to be given to foreign judgment is a matter of comity.[68] A foreign judgment can have no extraterritorial force, but civilized nations have, for their convenience, established a usage, through which final judgments of foreign courts of competent jurisdiction are recognized and allowed to have an effect under regulations and restrictions which vary in different countries.[69] A judgment *in rem* is universally treated as valid.[70] So

[66] 1 Kent's Commentaries, 18.

[67] Wheaton on International Law, sec. 15. See cases in which international law has been recognized as part of our law: Rose v. Himely, 4 Cranch, 241, 2 L. ed. 608; Miller v. United States, 11 Wall. 268, 20 L. ed. 135; Young v. United States, 97 U. S. 39, 24 L. ed. 992; The Estrella, 4 Wheat. 298, 4 L. ed. 574; Dow v. Johnson, 100 U. S. 158, 25 L. ed. 632; The Mereide, 9 Cranch, 388, 3 L. ed. 769; Respublica v. De Longchamps, 1 Dall. (Pa.) 111, 1 L. ed. 59.

[68] 2 Kent's Commentaries, 120.

[69] Wheaton on International Law, secs. 78, 79.

[70] Williams v. Armroyd, 7 Cranch, 423, 3 L. ed. 392; Hudson v. Guestier, 4 Cranch, 293, 2 L. ed. 625; Ennis v. Smith, 14 How. (55 U. S.) 400, 14 L. ed. 472; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. Rep. 1370, 32 L. ed. 239; Scott v. McNeal, 154 U. S. 34, 14 Sup.

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is a judgment by which the status of a person is affected; as, for instance, a decree by which a marriage is dissolved or confirmed.[71] Judgments discharging obligations entered into in a foreign country between persons who were citizens or residents of such country have been held conclusive of all matters determined by such judgments.[72]

§ 436. Foreign judgments in personam.—As a general proposition, it may be stated that foreign judgments for debts have not been regarded as conclusive, but only as *prima facie* evidence of the matters decided by them. It was said by Judge Story: "The general doctrine maintained in the American courts in relation to foreign judgments certainly is that they are *prima facie* evidence, but that they are impeachable. But how far and to what extent this doctrine is to be carried does not seem to be definitely settled. It has been decided that the jurisdiction of the court, and its power over the parties, and the things in controversy may be inquired into; and that the judgment may be impeached for fraud. Beyond this no definite lines have as yet been drawn."[73]

§ 437. Principle as declared by supreme court of the United States.—The supreme court of the United States in 1894 was called upon to determine what effect should be given in the

Ct. Rep. 1108, 38 L. ed. 896; Monroe v. Douglas, 4 Sand. Ch. 126; Holcomb v. Phelps, 16 Conn. 132; McKinsey v. Harding, 16 Fed. Cas. (No. 8866) 227, 4 N. B. R. 38; The Trenton, 4 Fed. 657; Pelton v. Platner, 13 Ohio, 217, 42 Am. Dec. 199; Cushing v. Laird, 107 U. S. 80, 2 Sup. Ct. Rep. 196, 27 L. ed. 395; The Parkhill, 18 Fed. Cas. (No. 10,755a) 1192; Alabama etc. R. R. Co. v. Jones, Fed. Cas. No. 127, 7 Bank. Reg. 171; Hilton v. Guyot, 159 U. S. 167, 16 Sup. Ct. Rep. 145, 40 L. ed. 109; Pierce v. The Alberto, Hoff. 441, 19 Fed. Cas. (No. 11,142) 633; Castrique v. Imrie, L. R. 4 H. L. 414.

[71] Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. Rep. 328, 28 L. ed. 298; Thompson v. Thompson, 91 Ala. 595, 8 South. 419, 11 L. R. A. 445; In re James, 99 Cal. 376, 37 Am. St. Rep. 62, 33 Pac. 1123; Peaslee v. Peaslee, 147 Mass. 180, 17 N. E. 510; Thomas v. King, 95 Tenn. 70, 31 S. W. 985. But see in New York as to divorce rendered against a resident of that state without personal service, Williams v. Williams, 130 N. Y. 198, 27 Am. St. Rep. 519, 29 N. E. 99, 14 L. R. A. 222; Roth v. Roth, 104 Ill. 46, 44 Am. Rep. 84.

[72] May v. Breed, 7 Cush. 15, 54 Am. Dec. 700.

[73] Story on Conflict of Laws, sec. 608.

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United States to a judgment rendered in France for a sum of money. In France, the rule is that no foreign judgment can be executed without a review to the bottom—"*au fond.*" Such review may extend to the whole merits of the cause of action on which the judgment is founded. Mr. Justice Gray, who delivered the opinion of the court, entered upon an exhaustive examination of the subject of foreign judgments, and reviewed the practice in the various countries of the world as to the effect given by them to foreign judgments, and announced as the conclusion of the court that the reasonable, if not the necessary, result of the decisions, was that judgments rendered in France or in any other foreign country, by the laws of which judgments of the American courts are reviewable upon the merits, are not entitled to full credit and conclusive effect when suit is brought upon them in the country, but are to be considered only as *prima facie* evidence of the justice of the claim of plaintiff.[74]

§ 438. International law founded upon mutuality.—Mr. Justice Gray, in the course of the opinion, said that in holding such a judgment, for want of reciprocity, not to be conclusive of

[74] Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40 L. ed. 95. The court, per Mr. Justice Gray, said: "When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court having jurisdiction of the cause and of the parties, and upon due allegations and proofs and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence at least of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law and by the comity of our own country it should not be given full credit and effect."

Section 661 (new number, 723) of the Code of Civil Procedure of the German Empire, as amended in 1905, provides:

"Judgment of execution is to be had without examination of the legality of the judgment (which is being executed).

"Judgment of execution is to be granted only after the judgment of the foreign court has become final according to the law governing the latter court. It is not to be granted when recognition of the judgment is prohibited by section 328."

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the merits of the claim, the court did not proceed upon any theory of retaliation upon one person by reason of injustice done to another, "but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive. By our law at the time of the adoption of the Constitution a foreign judgment was considered as *prima facie* evidence and as not conclusive. There is no statute of the United States, and no treaty of the United States with France or with any other nation which has changed that law or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country which did not give like effect to our own judgments. In the absence of treaty or statute, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more." [75]

§ **439. Dissenting views.**—Mr. Chief Justice Fuller did not join in the opinion of the majority of the court as pronounced by Mr. Justice Gray, but filed a dissenting opinion, in which he said

Section 328 is as follows:

"The recognition of a judgment of a foreign court is prohibited: (1) If the courts of the State to which the foreign court belongs have not jurisdiction according to German law. (2) If the defendant is a German and has not been made a party in so far as process or summons was not served upon him either in person in the State of the trial court nor through the aid of German judicial process. (3) If the judgment, to the prejudice of a German party, departs from the provisions of Article 13, Sections 1-3, or of Articles 17, 18 or 22 of the introductory law of the Civil Code, or from the provision of the part of Article 27 of the same law which refers to Article 13, Section 1, or from the provision of Article 13, Section 2, or in the case of Article 9, Section 3, to the prejudice of the wife of a foreigner who has been declared dead. (4) If the enforcement of the judgment would violate good morals or the purpose of German law. (5) If reciprocity be not guaranteed."

The provisions of section 5 do not forbid the recognition of the judgment if the judgment concerns a claim which does not involve property rights, and if according to German law, jurisdiction would not lie in Germany.

[75] Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40 L. ed. 95.

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that he regarded the question as one which should be determined by the ordinary and settled rule in respect of allowing a party who has had the opportunity of proving his case in a competent court to retry it on the merits. He was of the opinion that the doctrine of *res adjudicata* which applied to domestic judgments should also be applied to foreign judgments, and that such doctrine rested on the general ground of public policy, that there should be an end of litigation. He stated that this application of the doctrine was in accordance with American jurisprudence, and it was not necessary that the court should hold it to be required by some rule of international law. "The fundamental principle concerning judgments," said he, "is that disputes are finally determined by them, and I am unable to perceive why a judgment *in personam* which is not open to question on the ground of want of jurisdiction, either intrinsically or over the parties, or of fraud, or any other recognized ground of impeachment, should not be held *inter partes*, though recovered abroad, conclusive on the merits." He concluded by saying: "I cannot yield my assent to the proposition that because by legislation and judicial decision in France that effect is not given there to judgments recovered in this country which, according to our jurisprudence, we think should be given to judgments wherever recovered (subject, of course, to the recognized exceptions), therefore, we should pursue the same line of conduct as respects the judgment of French tribunals. The application of the doctrine of *res judicata* does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." Justices Harlan, Brewer and Jackson concurred in this dissent.[76]

§ 440. **Subject continued—Impeachment for fraud.**—At the same term of the supreme court of the United States at which Hilton v. Guyot was decided, the court held that to warrant the impeachment of a foreign judgment because it was procured by fraud, the fraud must be distinctly alleged and charged.[77] In the case just cited, an action was commenced upon a Canadian

[76] Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. Rep. 139, 40 L. ed. 131.

[77] Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. Rep. 171, 40 L. ed. 133.

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judgment and an answer was interposed which did not deny the jurisdiction of the court over the cause or over the defendant, nor did it allege that fraud was committed in procuring the judgment, nor set up any other special ground for not giving it full effect, but simply alleged the same defenses which were alleged, or might have been alleged, in the Canadian court, and sought to reopen and retry the whole merits. The court held that inasmuch as by the law of England which prevailed in Canada a judgment of an American court would be allowed full and conclusive effect, the defense to the judgment, which it was attempted to make, could not be permitted.[78] "It is the settled law of this state that a foreign judgment is conclusive upon the merits. It can be impeached only by proof that the court in which it was rendered had not jurisdiction of the subject matter of the action, or of the person of the defendant, or that it was procured by means of fraud. The judgments of the courts of a sister state are entitled to full faith and credit in the courts of the other states, under the Constitution of the United States, but effect is given to the judgments of the courts of foreign countries by the comity of nations, which is part of our municipal law."[79]

[78] Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. Rep. 171, 40 L. ed. 133.

[79] Dunstan v. Higgins, 138 N. Y. 70, 34 Am. St. Rep. 431, 30 L. R. A. 668, 33 N. E. 729, per O'Brien, J.; Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404. The fraud by which a judgment may be impeached cannot consist only in false and fraudulent documents or in false evidence submitted to the court, and the truth of which was contested and determined by the court, but it must be extrinsic to the matter tried in the cause. United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 925; Steel v. St. Louis Smelt. & Ref. Co., 106 U. S. 447, 1 Sup. Ct. Rep. 389, 27 L. ed. 226; Moffat v. United States, 112 U. S. 24, 5 Sup. Ct. Rep. 10, 28 L. ed. 623; United States v. Minor, 114 U. S. 233, 5 Sup. Ct. Rep. 836, 29 L. ed. 110; Reed v. Stanly, 89 Fed. 433; Dringer v. Receiver, 42 N. J. Eq. 580, 8 Atl. 815; In re Griffith, 84 Cal. 113, 23 Pac. 529; Fealey v. Fealey, 104 Cal. 359, 43 Am. St. Rep. 114, 38 Pac. 50; Camp v. Ward, 69 Vt. 289, 60 Am. St. Rep. 931, 37 Atl. 748; Marquez v. Frisbie, 101 U. S. 479, 25 L. ed. 802; United States v. Minor, 26 Fed. 752; United States v. White, 9 Saw. 127, 17 Fed. 562; Andes v. Millard, 70 Fed. 517; Pacific R. R. Co. v. Missouri etc. Ry., 2 McCrary, 229, 12 Fed. 642; United States v. Hancock, 12 Saw. 389, 30 Fed. 856; Yeatman v. Bradford, 44 Fed. 538; Harrison v. Walton, 95 Va. 726, 64 Am. St. Rep. 835, 30 S. E. 374, 41 L. R. A. 703; United States v. Northern Pac. R. Co., 95 Fed. 982; Adler v. Land etc. Co.,

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§ 441. **In the absence of fraud the merits cannot be inquired into.**—A record of a court of competent jurisdiction of British Honduras, showing the rendition of a judgment against a defendant by default is, when introduced in evidence, in an action by the plaintiff on the judgment, conclusive of such default.[80] In a case in Connecticut Mr. Justice Baldwin, after stating that it is the settled rule in England that "in an action instituted there on a foreign judgment rendered by a court of competent jurisdiction, the proceedings before which were not so conducted as to be clearly contrary to natural justice, the defendant cannot be allowed to go into the merits of the original cause of action, which were not tried in the foreign court, unless it be necessary, in order to support a claim, that the judgment was procured by fraud," declared that "no one who has been, or could have been, heard upon a disputed claim in a cause to which he was duly made a party, pending before a competent judicial tribunal, having jurisdiction over him, proceeding in due course of justice, and not misled by the fraud of the other party, should be allowed, after a final judgment has been pronounced, to review the contest in another country. The object of courts is hardly less to put an end to controversies than to decide them justly."[81]

§ 442. **Mexican judgments.**—A person in the employ of a railroad company suffered personal injuries in Mexico and brought an action in the federal circuit court for the western district of Texas to recover damages. It was held that a transcript of the proceedings in a Mexican court which, in connection with other evidence, made a *prima facie* showing, with the force of *res judicata*, of a settlement adverse to the plaintiff's right of recovery, should be received in evidence.[82]

114 Ala. 562, 62 Am. St. Rep. 140, 21 South. 493; McDonald v. Pearson, 114 Ala. 644, 21 South. 537; Weir v. Vail, 65 Cal. 470, 4 Pac. 425; Sullivan v. Lumsden, 118 Cal. 668, 50 Pac. 778; Langdon v. Blackburn, 109 Cal. 26, 41 Pac. 816; Telford v. Brinkerhoff, 163 Ill. 433, 45 N. E. 157; Richardson v. Stowe, 102 Mo. 44, 14 S. W. 812; Irvine v. Leyh, 102 Mo. 207, 14 S. W. 717; Mayor etc. New York v. Brady, 115 N. Y. 615, 22 N. E. 242; Wiseman v. Eastman, 21 Wash. 171, 57 Pac. 400.

[80] Christian etc. Co. v. Coleman, 125 Ala. 158, 27 South. 786.

[81] Fisher v. Fielding, 67 Conn. 91, 52 Am. St. Rep. 270, 34 Atl. 714, 32 L. R. A. 236.

[82] Mexican Cent. Ry. Co. v. Chantry, 136 Fed. 316, 69 C. C. A. 454.

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§ **443. Canadian judgments.**—In a case arising in New Hampshire the court refers to the case in the supreme court of the United States holding that the effect to be given to a foreign judgment is determined by the treatment given American judgments, but states that the question cannot be raised as against a Canadian judgment because the courts of Canada hold that judgments of the courts of the United States are conclusive upon the merits.[83] It is said by Mr. Black in his treatise on judgments that "the modern tendency of the decisions in this country is plainly and uniformly in the direction of holding foreign judgments *in personam*, rendered by courts having jurisdiction, to be binding and conclusive upon the parties, and not re-examinable upon the merits."[84]

It is provided by the Consolidated Ordinances of the Northwest Territories of Canada[85] "that in case any defendant is out of the territories, but has an agent, managing clerk or other representative resident and carrying on his business within the same," service of the summons may be made on such agent or representative, and that a judgment obtained by means of such service shall be valid. Under this provision, if a defendant has left the territory and sold all his property therein, yet has left a power of attorney authorizing his attorney to transact all business relating to his interests in Yukon Territory, which was used by the attorney in the settlement of his affairs, the summons in a suit may be served on such attorney, and the judgment obtained based on such service will be upheld. If no fraud is alleged, such judgment, when suit is brought on it in a court of the United States, will, under the rule of comity recognized between the courts of the two countries, be conclusive on the merits.[86]

§ **444. Rule in England.**—In England, at the present day, the rule is that all foreign judgments are considered as conclusive

[83] McDonald v. Grand Trunk Ry. Co., 71 N. H. 448, 93 Am. St. Rep. 550, 59 L. R. A. 448, 52 Atl. 982. See, also, Alaska Commercial Co. v. Debney, 144 Fed. 1, 75 C. C. A. 131.

[84] Black on Judgments, sec. 829. See, also, to same effect, Konitzy v. Mayer, 49 N. Y. 571; Coveney v. Phiscator, 132 Mich. 258, 93 N. W. 619; Glass v. Blackman, 48 Ark. 50, 2 S. W. 257; Alaska Commercial Co. v. Debney, 144 Fed. 1, 75 C. C. A. 131.

[85] Sec. 14, p. 198 (of 1898).

[86] Alaska Commercial Co. v. Debney, 144 Fed. 1, 75 C. C. A. 131.

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where it appears upon the face of the record that process has been duly served upon the defendant and he has had the opportunity of appearing and contesting the claims of plaintiff.[87]

§ **445. Contract to influence corruptly officer of foreign government.**—The courts of this country will not enforce a contract to bribe or influence corruptly the officers of a foreign government. The consul-general of the Ottoman government at New York commenced an action to recover a sum of money which he alleged was due to him for commissions on the sale of firearms to that government. The sales were made while the plaintiff was an officer of the Turkish government, through the influence which he claimed he exerted upon its agent, who had been sent to the United States to examine and report relative to the purchase of arms. The court declared that the contract was "corrupt in its origin and corrupting in its tendencies. The services stipulated and rendered were prohibited by considerations of morality and policy, which should prevail at all times and in all countries. and without which fidelity to public trusts would be a matter of bargain and sale and not of duty." The court also held that even if contracts are permissible by other countries, they are not enforceable in the courts of the United States if they contravene its laws, its morality, or its policy.[88]

§ **446. Consul cannot assume position antagonistic to his government.**—A consul is an officer of his government, and it is his general duty to guard and protect the interests of his government and those of its citizens or subjects. In Christian countries he is frequently permitted to engage in commercial pursuits, but he is not allowed to take any position antagonistic to the interests or policy of his government. "By some governments," said Mr. Justice Field, "he is invested, in the absence of a minister or ambassador to represent them, with diplomatic powers; and. as between their citizens or subjects, may also exercise judicial

[87] Burn v. Bletcher, 23 U. C. Q. B. 28; Bank of Australasia v. Nias, 16 Q. B. 717; Ferguson v. Mahon, 11 Ad. & E. 179; Henderson v. Henderson, 6 Ad. & E., N. S., 288; Castrique v. Inrie, L. R. 4 H. L. 414; Bank of Australasia v. Harding, 9 Com. B. 661; De Cosse Brissac v. Rathbone, 6 Hurl. & N. 301.

[88] Oscanyan v. Winchester R. Arms Co., 103 U. S. 261, 26 L. ed. 539.

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functions. By all governments his representative character is recognized, and for that reason certain exemptions and privileges are granted to him. In the Constitution of the United States, consuls are classed with ministers and ambassadors in the enumeration of parties whose cases are subject to the original jurisdiction of the supreme court, and in the treaty with the Ottoman Empire, authority is given to it to appoint consuls in the United States. . . . . A contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country; not from any consideration of the interests of that government or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people."[89] While an agreement to compensate a person for purely professional services is valid, yet any contract which is against public policy, or which is so intermingled with one of that character as to make the two one transaction, cannot be enforced.

§ 447. Jurisdiction of consuls by treaties.—Many treaties have been made by the United States with European nations whereby exclusive jurisdiction of disputes between masters of vessels and

[89] In Oscanyan v. Winchester R. Arms Co., 103 U. S. 261, 26 L. ed. 539, citing Hope v. Hope, 8 De Gex, M. & G. 731; Watson v. Murray, 8 C. E. Green (23 N. J. Eq.), 257. Where two transactions are so intermingled as to become one, and one of them is against public policy, the whole transaction is void. Washington Irr. Co. v. Krutz, 119 Fed. 286, 56 C. C. A. 1. An agreement for compensation to procure a contract with the government to furnish it supplies is against public policy and cannot be enforced. Tool Co. v. Norris, 2 Wall. (69 U. S.) 45, 17 L. ed. 868. Where compensation was claimed for services rendered in procuring the passage of a law by a state legislature, upon a contract that if the law was not passed, or if passed was not accepted and adopted or used by the stockholders, no compensation should be allowed, it was held that the contract was void as against public policy. Marshal v. Railroad Co., 16 How. 314, 14 L. ed. 953. Illegality of a contract need not be pleaded, as the court will refuse to enforce a contract when its illegality is made apparent. Reed v. Johnson, 27 Wash. 55, 67 Pac. 386, 57 L. R. A. 404. If the tendency of a contract is to promote illegal acts, it is against the policy of the law, and hence illegal. Young v. Thompson, 14 Colo. App. 315, 59 Pac. 1037. See, also, Wood v. McCann, 6 Dana, 366; Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535.

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their crews have been conferred upon consuls.[90] The treaty may provide that the consul shall have exclusive jurisdiction;[91] but it would seem that to confer this jurisdiction a special provision in a treaty is necessary.[92]

§ 448. **Liability for false imprisonment.**—A constable will be liable in an action for false imprisonment if, proceeding under a process issued from a state court in a controversy over which a consul by the provisions of a treaty has exclusive jurisdiction, he arrests the captain of a vessel, and if he at the time at which he made the arrest was fully informed of the provisions of the treaty.[93] But a consular compact will not prevent a federal court from assuming jurisdiction where the master of a vessel is guilty of a barbarous and malicious assault on a seaman.[94] But where the consul has, by a treaty, exclusive jurisdiction, his decision is not subject to review by the courts.[95]

§ 449. **Authority of consul in enemy's country.**—A consul of the United States has, by virtue of his official position, no power to grant any license or permit to exempt a vessel of the enemy from capture and confiscation.[96] "To exempt the property of enemies from the effect of hostilities," says Sir William Scott, "is a very high act of sovereign authority; if at any time delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who in legal language are termed mandatories, or by persons in whom such a power is vested in any official situation to which it may be considered incidental. It is

[90] See Norberg v. Hillbren, 5 N. Y. Leg. Obs. 177, 7 Am. Law Rev. 418; The Elwine Kreplin, 9 Blatchf. 438, Fed. Cas. No. 4,426; Tellefsen v. Fee, 168 Mass. 188, 60 Am. St. Rep. 379, 46 N. E. 562, 45 L. R. A. 481; The Marie, 49 Fed. 286; The Wellhaven, 55 Fed. 80; In re Wildenhaus, 28 Fed. 924.

[91] The Burchard, 42 Fed. 608.

[92] Weiberg v. The Brig St. Oloff, 2 Pet. Adm. 432, Fed. Cas. No. 17,357.

[93] Tellefsen v. Fee, 168 Mass. 189, 60 Am. St. Rep. 379, 46 N. E. 562, 45 L. R. A. 481.

[94] The Salomoni, 29 Fed. 534. See, also, Enos v. Sowle, 2 Hawaiian, 332.

[95] The Elwine Kreplin, 9 Blatchf. 438, Fed. Cas. No. 4,426.

[96] The Benito Estenger, 176 U. S. 568, 20 Sup. Ct. Rep. 489, 44 L. ed. 592.

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quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station."[97]

§ 450. Power of foreign consul to commence suit in rem.—While a foreign consul has a right to claim the property or to commence a proceeding *in rem*, where the rights of property of his fellow-citizens are involved, without a special procuration from those persons in whose behalf he is moving, yet he is not entitled to receive restitution of the property in question without producing special authority from the particular persons who are entitled to it.[98] "To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern and justice is sought for in courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States has sanctioned the exercise of this right; and it is impossible that any evil or inconvenience can flow from it."[99]

§ 451. Intervention of consul.—A foreign consul can petition the court to have paid into the treasury the proceeds of property libeled.[100] While a consul is not entitled to represent his sovereign in a country where the sovereign has an ambassador, he is entitled to intervene in behalf of all subjects of that power that are interested.[101] When a consul is allowed to intervene, he is not attempting to negotiate with a foreign state nor to vindicate any prerogative of government, but he simply is the representative of his government as having an interest in property proceeded against.

[97] The Hope, 1 Dod. 226, quoted in Rogers v. The Amado, Newb. 400, 20 Fed. Cas. No. 12,005.

[98] The Bello Corrunes, 6 Wheat. 152, 5 L. ed. 229.

[99] Mr. Justice Johnson in The Bello Corrunes, 6 Wheat. 152, 5 L. ed. 229. See, also, The Elizabeth, Blatchf. Pr. 253, Fed. Cas. No. 4350.

[100] The Ship Adolph, 1 Curt. 89, Fed. Cas. No. 86. See, also, The Conserva, 38 Fed. 434.

[101] Robson v. The Huntress, 2 Wall. Jr. 59, Fed. Cas. No. 11,971. See, also, The Bello Corrunes, 6 Wheat. 166, 5 L. ed. 229.

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§ **452. Administration of estates.**—The functions of a consul in the administration of the estates of the subjects of the nation by which he is appointed, and who dies within his jurisdiction or consulate, are often regulated by treaty. It is said in the consular regulations: "In Austria-Hungary, Belgium, Germany, Italy and Netherlands and colonies, the local authorities are requested to inform consuls of the death of their countrymen intestate or without known heirs. In Germany, Roumania, and Servia, consuls have the right to appear for absent heirs or creditors until regularly authorized representatives appear. In Muscat, Morocco, Persia, Peru, Salvador, Tripoli, and Tunis, they may administer on the property of their deceased countrymen. In Colombia they may do so except when legislation prevents it. In Costa Rica, Honduras, and Nicaragua, they may nominate curators to take charge of such property, so far as local laws permit. In Paraguay, they may become temporary custodians of such property. In Germany, they may take charge of the effects of deceased sailors."[102]

We have considered on a former page the right of a consul, based on a treaty stipulation, to administer upon the estate of a deceased subject of the sovereign appointing him in preference to a public administrator or other officer authorized by the law of a state.[103]

§ **453. Shipping and seamen.**—Various treaties between the United States and other nations contain provisions as to the duties and powers of consuls relative to shipping and seamen. The eighth article of the treaty with France provides: "The respective consuls-general, consuls, vice-consuls, or consular agents shall have exclusive charge of the internal order of the merchant vessel of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those per-

[102] Consular Regulations of the United States (1896), sec. 91, p. 35.

[103] See sec. 202, ante.

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sons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls, made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls."[104] As Congress has provided a mode of arrest in the execution of treaties,[105] this must be regarded as the only means proper to be adopted for the purpose, and hence the officer named is the only one authorized to make the arrest on the requisition of a French consul. But an unauthorized arrest by a state official will not entitle a seaman to a discharge on *habeas corpus*, when brought before the court, because the irregularity of the arrest is cured by the court in examining into the case under the Revised Statutes providing for the execution of treaties relating to consular jurisdiction over the crews of foreign vessels in the waters of the United States.[106]

§ **454. Action of consul not conclusive.**—Where a libel is filed for wages, the action of a consul in discharging a seaman in a foreign port is not conclusive.[107] So, where an American consul had seamen arrested for desertion, for failure to appear for work at the proper hour, his mere certificate that the men had deserted, without any record of an examination before him, was held, in a suit for wages, not to be legal evidence of desertion.[108]

§ **455. American seamen.**—But these treaty provisions do not refer to American seamen. Thus, it is held that the treaty between the United States and Germany does not take away the jurisdiction of the admiralty courts of the United States to decide the rights of an American seaman entering and leaving the service of a German vessel in the United States.[109]

[104] 10 Stats. at Large, 992.

[105] 13 Stats. at Large, 121; Rev. Stats., secs. 4079-4081.

[106] Dallemagne v. Moisan, 197 U. S. 169, 25 Sup. Ct. Rep. 422, 49 L. ed. 709; Rev. Stats., secs. 4079-4081, U. S. Comp. Stats. 1901, p. 2766.

[107] Campbell v. Steamer Uncle Sam, McAll, 77, Fed. Cas. No. 2,372.

[108] Graves v. The W. F. Babcock, 79 Fed. 92.

[109] The Neck, 138 Fed. 144. See 17 Stats. at Large, 928.

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§ 456. Fees for prosecution of claim.—The Revised Statutes of the United States prohibit a person holding a place of trust or profit under the government from acting as agent for the prosecution of a claim against the United States.[110] If a person enters into a contract with another to assist him in the prosecution of the claims of a city against the government, and in a brief time subsequent to the execution of the contract becomes a minister of the United States to a foreign country, and holds this position during the prosecution of the claim, he cannot recover any fee for its prosecution.[111] But while he cannot recover any fee for his services, he can, upon payment of the claims, recover from his associate in the contract any attorney fees and costs advanced for his benefit.[112]

§ 457. Judicial notice of signature and seal.—The court takes judicial notice of the seal and signature of consular officers.[113] Hence, a copy of a corporation contract filed in England, which is certified by the assistant registrar of joint stock companies, and to which is attached the signature of a London notary stating that the signature is genuine, accompanied by the signature of the vice and deputy consul-general of the United States at London, under his seal of office, is properly certified.[114]

§ 458. Acknowledgments and affidavits by consular officers.—By the Revised Statutes of the United States, power is conferred upon consular officers to perform any notarial act which a notary public is required or authorized by law to perform in the United States.[115] Under the provisions of a code of a state declaring that affidavits and depositions may be made and taken outside of the state before any notary public or other person authorized to take depositions, it is held that a consular officer is a notary public, so that a deposition taken by him is admissible in evidence.[116] An acknowledgment of a deed and mortgage can be

[110] Rev. Stats., sec. 5498; Comp. Stats. 1901, p. 3707.

[111] Fox v. Willis, 24 Ky. Law Rep. 1773, 72 S. W. 330; Id., 24 Ky. Law Rep. 2173, 73 S. W. 743.

[112] Fox v. Willis, *supra*.

[113] Barber v. International Co. of Mexico, 73 Conn. 587, 48 Atl. 758.

[114] Barber v. International Co. of Mexico, 73 Conn. 587, 48 Atl. 758.

[115] Rev. Stats., sec. 1750; U. S. Comp. Stats., p. 1196.

[116] Browne v. Palmer, 66 Neb. 287, 92 N. W. 315.

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taken by a deputy consul-general.[117] The word "consul" includes any person invested by the government with the functions of consul-general, vice consul-general, or vice-consul. An acknowledgment before a consul-general is valid.[118]

[117] Stewart v. Linton, 204 Pa. 207, 53 Atl. 744. See, also, Evans v. Lee, 11 Neb. 194; Mott v. Smith, 16 Cal. 533; Brown v. Landon, 30 Hun, 57.

[118] Morris v. Lenton, 61 Neb. 537, 85 N. W. 565. It is held that a deputy United States consul, by reason of his confidential relations with the consul and on the ground of public policy, is not qualified to act as a commissioner to take the deposition of the consul issued under an act of Maryland of 1773, in a case in which the consul is the plaintiff, and that a deposition taken by the deputy under such circumstances will be suppressed if it is shown that the defendant was ignorant of the fact that the commissioner was the deputy consul at the time when the deposition was taken. Massachusetts Mut. Acc. Assn. v. Dudley, 15 App. D. C. 472.

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CHAPTER XIV.

NATURALIZATION AND EXPATRIATION.

§ 459. Naturalization and expatriation.
§ 460. Perpetual allegiance.
§ 461. American doctrine.
§ 462. Compulsory military service.
§ 463. Claim of exemption as a matter of comity.
§ 464. Treaties of naturalization.
§ 465. Other treaties on same subject.
§ 466. Citizens in ceded territory.
§ 467. Effect of judgment.
§ 468. Setting aside certificate of citizenship under recent law.
§ 469. Collective naturalization by admission of a state.
§ 470. Expatriation of American citizens.
§ 471. Statute of 1907.

§ **459. Naturalization and expatriation.**—It is not proposed to enter at length into a discussion of the questions relating to naturalization and expatriation. So far as naturalization is concerned, it is purely a matter for internal regulation, as Congress may say what class of persons shall or shall not be admitted to citizenship, and upon what terms. Many questions have arisen as to the acts that would deprive a foreign-born citizen who has become naturalized in the United States of his rights of citizenship when he had left the United States either for a temporary or permanent residence abroad. The perplexing questions as to what acts would constitute a renunciation of American citizenship which formed the basis of much diplomatic correspondence have, so far as the government of the United States is concerned, now been settled by legislation.

§ **460. Perpetual allegiance.**—Frequent disputes have arisen between the United States and European governments which claimed the right to demand military service from persons born within their allegiance but who had become naturalized citizens of the United States. The doctrine of perpetual allegiance was thus expressed by Lord Greenville: "No British subject can, by such a form of renunciation as that which is prescribed in the

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American law of naturalization, devest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the king's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part."[1] This principle was not admitted by the United States. In 1848 Mr. Buchanan, Secretary of State, in a note to Mr. Bancroft, Minister to England, said: "Whenever the occasion may require it, you will resist the British doctrine of perpetual allegiance, and maintain the American principle that British native-born subjects, after they have been naturalized under our laws, are, to all intents and purposes, as much American citizens and entitled to the same degree of protection as though they had been born in the United States."[2]

§ 461. **American doctrine.**—The United States settled the principle to prevail in this country by declaring that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the right of life, liberty and the pursuit of happiness," and that "any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic."[3] It was further declared that "all naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this government, the same protection of persons and property which is accorded to native-born citizens,"[4] and that whenever it is made known to the President "that any citizen of the United States has been unjustly deprived of his liberty, by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not

[1] To Mr. King, American Minister, March 27, 1897, American State Papers, For. Rel., II, 148.

[2] 47 Brit. & For. State Pap. 1236, 1237.

[3] Rev. Stats., sec. 1999; U. S. Comp. Stats. 1901, 1269.

[4] Rev. Stats., sec. 2000; Comp. Stats. 1901, 1270.

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amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release."[5] In England it is now, by statute, declared that a British subject may expatriate himself.[6]

§ **462. Compulsory military service.**—The question has arisen as to the obligation of a foreign resident to render compulsory military service, and Mr. Seward, while Secretary of State, expressed the rule to be that "No alien-born person is liable to render military service unless he has been naturalized on his own application, or has made a voluntary declaration on oath of his intention to become a citizen by naturalization, according to law, or has claimed and actually exercised the political right of voting as a citizen of the United States."[7] The government of the United States during the Civil War claimed that all persons who had voted as state citizens were liable to conscription, and declared by an act of Congress that the levy should include "all persons of foreign birth, who shall have declared on oath their intention to become citizens."

But where there is no treaty stipulation convening the case, a citizen of the United States who is a resident in Chile cannot claim exemption from service in a temporary civic guard in which all residents are required to serve by law.[8]

§ **463. Claim of exemption as a matter of comity.**—In 1873 Mr. Davis, Assistant Secretary of State, said that there was no treaty stipulation between Great Britain and the United States which exempts the citizens or subjects of either party from military duty in the forces of the other either in peace or war, and that such exemption could not be claimed as a matter of right. But "as a matter of comity and reciprocity, however, we certainly can claim them. During the late Civil War in this country, there were numerous instances where British subjects were drafted into the military service of the United States, but were subsequently discharged upon the application of the British Minister here. The only cases in which a compliance with such an application was refused were the few in which persons of that nationality

[5] Rev. Stats., sec. 2001; U. S. Comp. Stats. 1901, 1270.

[6] 33 & 34 Vict. 105, c. 14.

[7] 62 MS. Dom. Let. 333, 502.

[8] Mr. Fish, Secretary of State, to Mr. Williamson, No. 140, June 13, 1876, MS. Inst. Chile, XVI, 181.

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had voted in states where foreigners not fully naturalized are allowed that privilege."[9]

§ **464. Treaties of naturalization.**—A treaty relating to naturalization was concluded between the United States and the North German Confederation on February 22, 1868.[10] Similar treaties were made with Bavaria, May 26, 1868;[11] Baden, July 19, 1868;[12] Württemberg, July 27, 1868; and Hesse, August 1, 1868.[13] On May 26, 1869, a naturalization convention was concluded between the United States and Sweden and Norway, whereby a citizen of one country who has resided in the other "for a continuous period of at least five years," and has become naturalized is recognized as a citizen of the country of his adoption. In a protocol accompanying the treaty it is declared that the residence of five years shall not be considered a prerequisite where a person has been discharged from his original citizenship.[14]

§ **465. Other treaties on same subject.**—The United States and Great Britain, by a convention, signed May 30, 1870, recognize in one country naturalization acquired in the other.[15] In 1870, a convention was entered into between the United States and the Austro-Hungarian monarchy, providing for the naturalization of citizens of the respective countries after an uninterrupted residence of five years. It is stipulated that a naturalized citizen of one party on return to the territory of the other shall be liable to trial and punishment for an action punishable by the laws of his country committed before his immigration, and that in particular a former citizen of the Austro-Hungarian monarchy who, under the treaty, would be held to be an American citizen, is liable to trial and punishment according to the laws of Hungary for nonfulfillment of military duties. "1st. If he has emigrated, after having been drafted at the time of conscription, and thus having become enrolled as a recruit for service in the standing army; 2d. If he has emigrated whilst he

[9] March 7, 1873, 69 MS. Desp. to Consuls, 254.
[10] 15 Stats. at Large, 615.
[11] 15 Stats. at Large, 661.
[12] 16 Stats. at Large, 371.
[13] 16 Stats. at Large, 473.
[14] 17 Stats. at Large, 809.
[15] 16 Stats. at Large, 775.

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stood in service under the flag, or had leave of absence only for a limited time; 3d. If having a leave of absence for an unlimited time, or belonging to the reserve or to the militia, he has emigrated after having received a call into service, or after a public proclamation requiring his appearance, or after war has broken out." The treaty, however, provides that a former citizen of that country naturalized in the United States, who, after his emigration, "has transgressed the legal provisions or military duty by any acts or omissions other than those above enumerated in the clauses numbered 1, 2, and 3, can, on his return to his original country, neither be held subsequently to military service, nor remain liable to trial and punishment for the nonfulfillment of his military duty."[16] Similar provisions are to be found in the treaties with European powers having a compulsory military service. A convention was entered into between the United States and Belgium in 1868, providing that citizens of one country naturalized in the other shall be deemed citizens of the latter.[17] A similar treaty was concluded with Denmark in 1872,[18] and with Hayti in 1902.[19]

§ **466. Citizens in ceded territory.**—It has been provided generally in the treaties of cession by which the United States has acquired new territory that those who were citizens of such territory before cession should be considered citizens of the United States. This branch of the subject has been considered in a preceding section.[20]

[16] 17 Stats. at Large, 833.

[17] 16 Stats. at Large, 747. As to military service, the third article of this treaty provides: "Naturalized citizens of either contracting party who shall have resided five years in the country which has naturalized them cannot be held to the obligation of military service in their original country, or to incidental obligation resulting therefrom, in the event of their return to it, except in cases of desertion from organized and embodied military or naval service, or those that may be assimilated thereto by the laws of that country."

[18] 17 Stats. at Large, 941.

[19] 33 Stats. at Large, 2101, 2157.

[20] See sec. 295. The treaty of 1794 with Great Britain stipulated that British subjects residing in the territory evacuated by the British troops who continued so to reside without declaring at any time before the expiration of one year thereafter their intention to remain British subjects should be considered American citizens. 8 Stats. at Large, 116. The treaty with

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§ 467. Effect of judgment.—An order of court admitting an alien to citizenship has the effect of a judgment of court and is entitled to the same consideration, and it cannot be set aside except in some mode recognized by law for setting aside judgments, as it possesses the same qualities as any other judgment.[21] Under the prior naturalization act it was held that a certificate of citizenship could not be set aside upon the ground of a false representation of facts to the court.[22] A record of naturalization cannot be impeached collaterally.[23]

§ 468. Setting aside certificate of citizenship under recent law. The naturalization law recently passed provides that "it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days' personal notice in which to make answer to the petition of the United States; and if the holder of such certificate

France by which Louisiana was ceded declared that the inhabitants should be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the constitution, to the enjoyment of all the rights of American citizens. 8 Stats. at Large, 200. In the treaty with Spain by which Florida was ceded the provision was that the inhabitants "shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights and immunities of the citizens of the United States." 8 Stats. at Large, 252.

[21] United States v. Norsch, 42 Fed. 417; Tinn v. U. S. District Attorney, 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152; Commonwealth v. Paper, 1 Brewst. 263; In re McCoppin, 5 Saw. 632, Fed. Cas. No. 8713; People v. McGowan, 77 Ill. 644, 20 Am. Rep. 254; Spratt v. Spratt, 4 Pet. (U. S.) 408, 7 L. ed. 902; Stark v. Chesapeake Ins. Co., 7 Cranch, 420, 3 L. ed. 391.

[22] United States v. Gleason, 78 Fed. 397; Pintsch C. Co. v. Bergin, 84 Fed. 141.

[23] People v. McGowan, 77 Ill. 647, 20 Am. Rep. 255; State v. Macdonald, 24 Minn. 59; McCarthy v. Marsh, 5 N. Y. 263.

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be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the state or the place where such suit is brought."[24] This provision applies not only to certificates of citizenship issued under the act, but applies also to all certificates issued before its passage.[25]

§ 469. Collective naturalization by admission of a state.—When a state is admitted on an equal footing with the original states in all respects whatever, the admission will cause the adoption as citizens of the United States of those made members of the political community by Congress, and, who in the formation of the new state, are recognized as such by the consent of Congress; that is, a collective naturalization may be accomplished in the admission of a state, in accordance with the intention of Congress and the inhabitants of the state seeking admission.[26] When Texas was admitted as a state all the citizens of the former republic became citizens of the United States without any express declaration, as it was admitted on an equal footing with the original states.[27] As stated by Mr. Justice Matthews: "It rests with Congress to say whether, in a given case, any of the people, resident in the territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may have previously conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government as known to our system as a constitutional franchise belongs, under the Constitution, to the states and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the

[24] 34 Stats. at Large, 596, sec. 15.

[25] 34 Stats. at Large, 596, sec. 15.

[26] Boyd v. State of Nebraska, 143 U. S. 158, 12 Sup. Ct. Rep. 375, 36 L. ed. 103.

[27] 5 Stats. at Large, 798; 9 Stats. at Large, 108; McKinney v. Saviego, 59 U. S. (18 How.) 235, 15 L. ed. 365; Cryer v. Andrews, 11 Tex. 170; Barren v. Kelly, 31 Tex. 476; Carter v. Territory, 1 N. Mex. 317.

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agencies of government, state and national; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."[28] In various treaties with Indian tribes provisions have been made for such as desired to remain and become citizens of the United States.[29]

§ 470. Expatriation of American citizens.—The question of expatriation or renunciation of American citizenship acquired by foreign-born residents, who returned to their own country has been the object of much diplomatic correspondence, and the principles to be applied are not well defined. Finally to lay down definite rules, statutes have been passed defining the acts that shall be deemed to constitute acts of expatriation. In the recent naturalization act it is provided that if any alien who has acquired a certificate of citizenship shall, within five years after its issuance, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered *prima facie* evidence of a lack of intention on his part to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient to authorize the cancellation of his certificate, as fraudulent.[30]

§ 471. Statute of 1907.—In March, 1907, a statute was enacted by Congress which made express declaration as to what acts should constitute renunciation of citizenship. This statute provides that an American citizen shall be considered as having

[28] Murphy v. Ramsey, 114 U. S. 15, 44, 5 Sup. Ct. Rep. 747, 29 L. ed. 47, 57.

[29] As to the Choctaws, see 7 Stats. at Large, 335; as to the Cherokees, 7 Stats. at Large, 483; as to the Stockbridge tribe, 5 Stats. at Large, 647; as to the Brothertown Indians of Wisconsin, 5 Stats. at Large, 349. All white persons or persons of European descent who were born in any of the thirteen colonies, who had resided or been adopted many of them prior to 1776 and had adhered to the cause of Independence up to July 4, 1776, were invested with the privileges of citizenship by the Declaration. United States v. Ritchie, 58 U. S. (17 How.) 525, 15 L. ed. 236; Ingles v. Sailor's Snug Harbor, 28 U. S. (3 Pet.) 99, 7 L. ed. 617. See, also, Desbois' Case, 2 Mart. (La.) 185; United States v. Laverty, 3 Mart. (La.) 733, Fed. Cas. No. 15,569a; American Ins. Co. v. Canter, 26 U. S. (1 Pet.) 511, 7 L. ed. 242.

[30] Stats. at Large, 601, sec. 15.

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expatriated himself when he has been naturalized in any foreign state, or when he has taken an oath of allegiance to any foreign state. If he shall have resided for two years in the foreign state from which he came, or for five years in any foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during such years, but he may overcome this presumption by presenting satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as may be prescribed by the Department of State. No American citizen, however, shall be allowed to expatriate himself when the United States is at war. An American woman who marries a foreigner takes the nationality of her husband, but at the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein. A foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation, if she continues to reside in the United States, unless she makes a formal renunciation thereof before a court having jurisdiction to naturalize aliens; or if she resides aboard, she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation.

A child born within the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of the parents or by his resumption of American citizenship. But such naturalization or resumption must take place during the minority of the child. The statute further provides that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States. Children born outside the limits of the United States, who are citizens thereof in accordance with the provisions of the Revised Statutes,[31] and who continue to reside outside of the United States, are, in order to receive the protection of the government, required, upon reaching the age of eighteen years, to record at

[31] Rev. Stats., sec. 1993.

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an American consulate their intention to become residents and remain citizens of the United States, and are further required to take the oath of allegiance to the United States upon attaining their majority. Duplicates of any evidence, registration or other acts required by the statute are to be filed with the Department of State for record.[32]

[32] Stats. at Large, 1228.

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CHAPTER XV.

RESPONSIBILITY OF GOVERNMENT FOR MOB VIOLENCE.

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§ 473. Property of consul injured through negligence.
§ 474. Punishment of violation of treaty right—President Harrison's recommendation.
§ 475. Introduction of bill to carry out recommendation.
§ 476. President McKinley's recommendation.
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§ 472. **General comments.**—Several cases have occurred in the United States where foreign citizens have been injured or killed by the action of uncontrolled mobs, and when indemnity has been asked by their governments, the United States has consistently contended that it was not compelled to make indemnity, save in those special cases, such as an attack on the official representatives of a foreign government, or where, by virtue of a special clause in a treaty, there rested upon the government a special duty of protection. Still, Congress has appropriated money, in many instances, as indemnity to the sufferer or his heirs, always stating, however, that such appropriations were made out of humane consideration and not as an acknowledgment of liability.

In 1802 Attorney General Lincoln announced: "By the law of nations, if the citizens of one state do an injury to the citizens of another, the government of the offending party ought to take every reasonable measure to cause reparation to be made by the offender. But if the offender is subject to the ordinary processes of law, it is believed this principle does not generally extend to oblige the government to make satisfaction in case of the inability of the offender."[1]

Accordingly, where an American vessel seized an alleged Danish vessel as French property, on the south side of the Island of San Domingo, and while awaiting examination under the American flag a British ship seized the Danish vessel too, conveyed her to Jamaica and there condemned her, it was ruled that inasmuch as the first captors were not liable for capturing and holding the vessel long enough for examination, nor for the second capture, and as no liability rests upon the United States even for unlawful captures by its subjects, the United States was not obligated to indemnify the Danish owner.[2]

§ 473. **Property of consul injured through negligence.**—If, owing to the negligence of a foreign government, the personal property of a consul of the United States is injured, such government is liable for damages.[3] In 1875 Mr. Fish, Secretary of

[1] 1 Op. Atty. Gen. (1802) 106, 107.
[2] Lincoln, 1 Op. Atty. Gen. 106.
[3] Mr. Frelinghuysen, Secretary of State, to Mr. Mathews, January 16, 1883; MS. Inst. Barb. Powers, XVI, 103.

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State, in correspondence with the Mexican Minister relative to the lynching of a number of Mexican shepherds in Texas, assumed the position that a government is not "answerable in pecuniary damages for the murder of individuals by other individuals within its jurisdiction;" and that while it was the duty of a government to prosecute such offenders according to law by all means at its command, still, if this duty were honestly and diligently performed, the obligations of the government were fulfilled.[4] In 1888 Mr. Bayard, Secretary of State, declared that the position taken by the Department of State, as defined in Mr. Fish's notes, was still believed to be sound in international law.[5]

§ 474. Punishment of violation of treaty right—President Harrison's recommendation.—Congress has passed no law making the violation of the treaty rights of aliens a crime cognizable in the federal courts, though it has often been urged to do so. In his annual message of December 9, 1891, President Harrison called attention to this defect in our laws, and said: "It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal Courts. This has not, however, been done, and the Federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the state charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as Federal agents as to make this government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights."

§ 475. Introduction of bill to carry out recommendation.—Conformably to these suggestions, a bill was introduced in the Senate March 1, 1892, and favorably reported March 30, 1892, providing that any act committed in any state or territory in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United

[4] For. Rel. 1875, II, 973.

[5] For. Rel. 1888, II, 1308.

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States and such foreign country and constituting a crime under the laws of the State or Territory, shall constitute a like crime against the United States, and be cognizable in the federal courts. Congress, however, failed to make the bill a law.

§ 476. **President McKinley's recommendation.**—President McKinley, in his message of December 5, 1889, asked that the subject be taken up anew, and stated that the necessity for some such provision was apparent. "Precedent for constituting a Federal jurisdiction in criminal cases," said he, "where aliens are sufferers, is rationally deducible from the existing statute, which gives to the district and circuit courts of the United States jurisdiction of civil suits brought by aliens where the amount involved exceeds a certain sum. If such jealous solicitude be shown for alien rights in cases of merely civil and pecuniary import, how much greater should be the public duty to take cognizance of matters affecting the life and rights of aliens under the settled principles of international law no less than under treaty stipulation, in cases of such transcendent wrongdoing as mob murder, especially when experience has shown that local justice is too often helpless to punish the offenders."[6]

§ 477. **Renewal of recommendation.**—In his annual message of December 3, 1900, President McKinley renewed the recommendations that he had made in the preceding year for the extension to the federal courts of jurisdiction in this class of cases, where the ultimate responsibility of the federal government may be involved, and declared: "It is incumbent upon us to remedy the statutory omission which has led, and may again lead, to such untoward results. I have pointed out the necessity and the precedent for legislation of this character. Its enactment is a simple measure of previsory justice toward the nations with which we as a sovereign equal make treaties requiring reciprocal observance."[7]

§ 478. **President Roosevelt's recommendation.**—In his annual message of December, 1906, President Roosevelt spoke of the necessity of international morality, and declared that it should

[6] For Rel. 1889, XXII.

[7] For. Rel. 1900, XXII.

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be our steady aim to raise the ethical standard of national action, to the same extent as we strive to raise the ethical standard of individual actions, and that it was our duty not only to treat all nations fairly, but also to treat with justice and goodwill all immigrants who came to the United States under the law. He said: "Whether they are Catholic or Protestant, Jew or Gentile; whether they come from England or Germany, Russia, Japan or Italy, matters nothing. All we have a right to question is the man's conduct. If he is honest and upright in his dealings with his neighbor and with the State, then he is entitled to respect and good treatment. Especially do we need to remember our duty to the stranger within our gates. It is the sure mark of a low civilization, a low morality, to abuse or discriminate against or in any way humiliate such stranger who has come here lawfully and who is conducting himself properly. To remember this is incumbent on every American citizen, and it is of course peculiarly incumbent on every Government official, whether of the nation or of the several states."[8]

§ 479. **Hostility toward Japanese.**—The President stated that he was prompted to say this on account of the attitude of hostility assumed here and there toward the Japanese in this country. He spoke of our international obligations, and asserted that one of the great embarrassments attending their performance was the inadequacy of the statutes of the United States, and proceeded: "They fail to give to the National Government sufficiently ample power, thru United States courts and by the use of the Army and Navy, to protect aliens in the rights secured to them under solemn treaties which are the law of the land. I therefore earnestly recommend that the criminal and civil statutes of the United States be so amended and added to as to enable the President, acting for the United States Government, which is responsible in our international relations, to enforce the rights of aliens under treaties. Even as the law now is something can be done by the Federal Government toward this end, and in the matter now before me affecting the Japanese, everything that it is in my power to do will be done, and all the forces, military and civil, of the United States which

[8] Cong. Record, Vol. 41, No. 2, Dec. 4, 1906, p. 32.

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I may lawfully employ will be so employed. There should, however, be no particle of doubt as to the power of the National Government completely to perform and enforce its own obligations to other nations. The mob of a single city may at any time perform acts of lawless violence against some class of foreigners which would plunge us into war. That city by itself would be powerless to make defense against the foreign power thus assaulted, and if independent of this Government it would never venture to perform or permit the performance of the acts complained of. The entire power and the whole duty to protect the offending city or the offending community lies in the hands of the United States Government. It is unthinkable that we should continue a policy under which a given locality may be allowed to commit a crime against a friendly nation, and the United States Government limited, not to preventing the commission of the crime, but, in the last resort, to defending the people who have committed it against the consequences of their own wrongdoing."[9]

§ 480. Claims made by the United States.—The United States has in many instances made demands upon foreign governments for redress and indemnity for outrages committed on American citizens. Mr. Everett, as Secretary of State, maintained in 1853 that the government of Chile was responsible to the United States for the spoliation of property, by officers of Chile, belonging to citizens of the United States.[10]

Mr. Adee, Acting Secretary of State, in a letter to the Italian Ambassador, declared: "The general rule of international law observed by the United States is that sovereigns are not liable in diplomatic procedure for damages occasioned by the misconduct of petty officials, and agents acting out of the range not only of their real, but of their apparent authority."[11]

§ 481. Official interference limited to tortious acts.—It has been the practice of the United States to limit its official interference for the recovery of indemnity from foreign governments to

[9] Cong. Record, vol. 41, No. 2, Dec. 4, 1906, p. 32.

[10] Mr. Everett, Secretary of State, to Mr. Carcallo, February 23, 1853, MS. Notes to Chile, VI, 65.

[11] Notes to Italian Leg. IX, 451, 452, No. 602, August 14, 1900.

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tortious acts committed under their authority against the persons and property of its citizens. In the case of contracts, a different rule is observed. Where it is claimed that a contract has been violated, the practice has been not to interfere, unless the circumstances are extremely peculiar. Even then restrictions are confined to instructing the diplomatic agents of this country to use their good offices in behalf of the American citizens concerned.

Mr. Marcy, Secretary of State, writing to Mr. Clay, Minister to Peru, in 1855 asserted that without specific instructions no diplomatic agent of the United States ought to take part officially in alleged breaches by a foreign government of contracts with citizens of the United States, and stated that the reason for the course was obvious. "It does not comport with the dignity of any government to make a demand upon another which might not ultimately, on its face, warrant a resort to force for the purpose of compelling a compliance with it. Such a course cannot, under this Government, be adopted without authority from Congress, and it is almost impossible to imagine any contract or any circumstances attending the infraction of one by a foreign government which would induce Congress to confer such an authority upon the President." [12]

And Mr. Buchanan, Secretary of State, said: "Our citizens go abroad over the whole world and enter into contracts with all foreign governments. In doing this they must estimate the character of those with whom they contract and assume the risk of their ability and will to execute their contracts. Upon a different principle, it would become the duty of the Government of our country to enforce the payment of loans made by its citizens and subjects to the government of another country. This might prove exceedingly inconvenient to some of the States of this Union, as well as to other sovereign States." [13]

[12] MS. Inst. Peru, XV, 159, May 24, 1855; 6 Moore Int. L. D. 709.

[13] Mr. Buchanan to Mr. Ten Eyck, Commissioner to Hawaii August 28, 1848, MS. Inst. Hawaii, II, 1; 6 Moore Int. L. D. 709. Mr. Fish, Secretary of State, said: "Our long-settled policy and practice has been to decline the formal intervention of the Government except in cases of wrong and injury to persons and property, such as the common law denominates *torts* and regards as inflicted by force, and not the result of voluntary engagements or contracts.

"In cases founded upon contract, the practice of this Government is to confine itself to allowing its minister to exert his friendly good offices in

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§ 482. Rules of Department of State.—Mr. Bayard, while Secretary of State, declared that an appeal by one sovereign on behalf of a subject to secure from another sovereign the payment of a debt claimed as due to such subject was the exercise of a very delicate and peculiar prerogative, "which, by principles definitely settled in this Department, is placed under the following limitations:

"1. All that our Government undertakes, when the claim is merely contractual, is to interpose its good offices; in other words, to ask the attention of the foreign sovereign to the claim; and this is only done when the claim is one suspectible of strong and clear proof.

"2. If the sovereign appealed to denies the validity of the claim or refuses its payment, the matter drops, since it is not consistent with the dignity of the United States to press, after such a refusal or denial, a contractual claim for the repudiation of which, by the law of nations, there is no redress. . . . .

"3. When the alleged debtor sovereign declares that his courts are open to the pursuit of the claim, this by itself is a ground

commending the claim to the equitable consideration of the debtor without committing his own Government to any ulterior proceedings." Letter to Mr. Miller, May 16, 1871, MS. Dom. Let. 348. And again he said: "It is not the policy or the practice of this Department to interpose, as a matter of right, to press upon foreign governments claims of its citizens growing out of the nonfillment of private contracts. It does not, however, withhold the exercise of the good offices of its representatives in countries where such claims originate, in manifest instances of injustice to citizens deserving its aid; and you are directed, therefore, in that sense, to bring the matter before the minister for foreign affairs of Japan, with an expression of the strong hope on the part of this Government that ample justice may be done to the claimant.

"There is one consideration which inspires this Government with a deeper interest in cases of this description occurring in Japan than would be entertained concerning similar cases in some other countries, and that is that those foreigners whose services have been engaged by that judicious Government to impart to its officers and people a knowledge of the arts and sciences as a means of perfecting that development which has been so auspiciously begun, may receive such prompt and ample fulfillment of the engagements made by the authorities employing them as will serve as an encouragement to others so employed or to be employed, and that thus they may labor with zeal and confidence, and that the national progress may be thereby accelerated and assured." To Mr. Shepard, March 19, 1872, MS. Inst. Japan, I, 502.

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for a refusal to interpose. Since the establishment of the Court of Claims, for instance, the Government of the United States remands all claims held abroad, as well as at home, to the action of that court, and declines to accept for its executive department cognizance of matters which by its own system it assigns to the judiciary.

"4. When this Department has been appealed to for diplomatic intervention of this class, and this intervention is refused, this refusal is regarded as final unless after-discovered evidence be presented which, under the ordinary rules applied by the courts in motions for a new trial, ought to change the result, or unless fraud be shown in the concoction of the decision." [14]

§ 483. Redress for injuries—Wheelock's case.—While the United States will not interfere except under peculiar circumstances in the collection of debts or in matters of a purely contractual nature, yet where injuries or outrages have been committed upon American citizens, the United States has in several cases sought redress. An American citizen, John E. Wheelock, was arrested in 1879 in Venezuela by an officer who combined in himself the function of a magistrate and a police constable. The arrest was made upon the complaint of an Italian subject who charged Wheelock with having stolen a sum of money from the former's safe, but when the case came on for hearing before the district court, Wheelock was honorably acquitted, and the judge

[14] Mr. Bayard, Secretary of State, to Mr. Bispham, June 24, 1885, 156 MS. Dom. Let. 88; 6 Moore Int. L. D. 716. In 6 Moore's International Law Digest, 717-740, section 996, will be found a list of instances where diplomacy was held to be the only method of redress. In some of these the United States claimed that it had the right to compel other governments to act in good faith toward American citizens, and insisted that no action should be taken depriving these citizens of their rights except in due course of law, through judicial tribunals, and that they were entitled to demand a fair examination by an impartial tribunal. It was said that it was impossible to define in advance and with precision, those cases in which the national power might be exercised for the relief of American citizens, and that such intervention would rarely be necessary in countries where well-defined and established laws are in operation, but that where these elements of confidence and security do not exist, the United States is called upon to be more vigilant in watching over its citizens.

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declared that not even a ground of suspicion existed against him. The constable who made the arrest, it appeared, caused Wheelock's arms to be pinioned and subsequently inflicted upon him various tortures with the object of compelling him to make a confession. After the termination of the case, Wheelock attempted to make a claim against Venezuela for $50,000. The United States refrained, for the time being, from making a formal demand for reparation, but expressed the hope that the sense of justice and equity of the government of Venezuela would lead it to dispose of the question immediately and justly. The Venezuelan government declared that it did not owe any pecuniary liability to Wheelock, and that it had been determined by its judicial officers that there was no ground for continuing proceedings against the constable, nor for ordering his arrest. It stated that a new investigation had been ordered, but thought that even if a crime had been committed, the obligation of Venezuela would be discharged by his condemnation and punishment. It was admitted on the part of the United States that, as a general principle, the obligations of a government were satisfied by the condemnation and punishment of the perpetrator of a crime, but that this principle could not be applied to the proceedings against the Venezuelan constable, for there was every reason to believe that his vindication, the evidence of Wheelock not being adduced, was based solely on his own testimony and that of his subordinates, and in effect there was an absolute denial of justice.

§ **484. Offer of settlement.**—Finally an offer of $6,000 was made by the Venezuelan Minister in settlement of the controversy, the Minister declaring that the payment was made out of pure deference to the people of the United States, and that his government was not to be understood as acknowledging the precedent that any person considering "himself injured or aggrieved by the acts of public functionaries, and still less by those of private individuals of the nation, may disregard the ordinary means of redress—i. e., the competent courts of the country—and have direct recourse to the diplomatic interference of his government as a means of securing reparation." Mr. Bayard stated that "As sovereign States, both the United States and

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Venezuela have the undoubted right to be satisfied, each for itself, that no wrong done to its citizens by the other passes unredressed; and neither sovereign can rightly be expected to recognize validity as attaching to the municipal enactments of the one which may assume to bar the exercise of the rights given by international law to the other." He intimated that the object which the two governments had in view was to reach a "practical adjustment" of the dispute.[15]

§ 485. Case of William Wilson.—William Wilson, a citizen of the United States, was shot without provocation by the acting governor of Roma, Norberto Arguello, at Bluefields, Nicaragua, in March, 1894. One of the policemen of the acting governor participated in the murder. It appeared from the evidence that Wilson had received severe treatment from his assailants. Promises were made by the superior agents of Nicaragua that the murderer would be arrested and punished, but these promises were not fulfilled. The United States demanded of the government of Nicaragua that it should show its disapproval of the action of its officers; that an immediate trial of Arguello should be had; that Governor Torres, who was his protector, should be discharged from office; that the accomplice of the murderer should receive proper punishment, and that such measures should be taken by the government of Nicaragua as should clearly show its purpose and ability to protect the lives and interests of American citizens living in the reservation, and should manifest its intent to punish crimes committed against citizens of the United States. The arrest of Arguello was effected, but he escaped, and the government of Nicaragua promised that all efforts would be made to secure his recapture. A demand was also made that one Lacayo, a commissioner to the Mosquito reservation, should be removed from office, as he was considered even more deserving of blame than Torres. The Nicaraguan government removed Torres, but alleged that Lacayo had performed his full duty, and asked that the demand for his removal be withdrawn, and asserted that efforts would be made for the recapture of Arguello,

[15] Mr. Soteldo to Mr. Bayard, April 2, 1885, For. Rel. 1885, 930; Same to same, June 29, 1885, Id. 933; Mr. Bayard to Mr. Soteldo, July 7, 1885, Id. 934; 6 Moore's Int. L. D., sec. 1001.

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and that it had been ordered that the policeman who was his accomplice should be placed on trial.[16]

§ 486. **Zambrano's case.**—The employer of a Mexican named Zambrano charged him with having stolen and pawned a fowling-piece, and while they were proceeding on their way to the pawnshop they met one McKenzie, a ranger, whom the employer requested to accompany them with a view of the probable arrest of the Mexican. The latter confessed the theft while at the pawnshop but subsequently sought to flee, and when he had proceeded as far as six or eight paces the ranger fired at him three shots, one of which entered his shoulder and another his neck. The wounded man was taken to the prison, where the city physician cared for him. He made a confession at his trial, but received only five days' imprisonment, the court taking into consideration his former misfortune and detention. Allegations were made that the ranger had no lawful right to fire, and that the firing was not necessary to effect his capture, but the grand jury, after hearing the evidence, concluded to return no indictment, and in the ranger's behalf it was asserted that he was partially lame and at considerable disadvantage in attempting to apprehend an escaping prisoner. Complaint was officially made by the Mexican government of the treatment of Zambrano and an indemnity was demanded. The United States, placing its action on the ground that the authorities had failed to try and punish the ranger for the unlawful shooting of the Mexican, offered to the Mexican government an indemnity of $500. This offer the Mexican government accepted.[17]

§ 487. **Case of Dr. Shipley.**—A member of the Turkish police in August, 1903, at Smyrna, attacked, wounded and robbed Dr. Shipley, a citizen of the United States, who was visiting that place, and during the commission of the outrage another member of the police force looked on but rendered no assistance. The attention of the Turkish government was called to the occurrence, and finally the commandant of the police at Smyrna made a full and formal apology to the American consul and also

[16] Mr. Gresham, Secretary of State, to Mr. Baker, Minister to Nicaragua, May 12, 1894, For. Rel. 1894, 468; For. Rel. 1894, 470, 475-477; 6 Moore Int. L. D. 746.

[17] For. Rel. 1904, 473, 482.

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to Dr. Shipley, whose claim for the property of which he was robbed was paid in full. Upon this being done, the United States declared the incident to be closed.[18]

§ 488. Grounds for interference.—The United States, in its diplomatic policy, proceeds upon the principle that a nation ought not to interfere in the causes or controversies of its citizens brought before foreign tribunals, except in case of a denial of justice or in a case of palpable injustice.[19] As stated by Mr. Jefferson when Secretary of State, "A foreigner, before he applies for extraordinary interposition, should use his best endeavors to obtain the justice he claims from the ordinary tribunals of the country."[20] Or, in the language of Mr. McLane, Secretary of State: "Although a government is bound to protect its citizens, and see that their injuries are redressed, where justice is plainly refused them by a foreign nation, yet this obligation always presupposes a resort, in the first instance, to the ordinary means of defence, or reparation, which are afforded by the laws of the country in which their rights are infringed, to which laws they have voluntarily subjected themselves, by entering within the sphere of their operation, and by which they must consent to abide. It would be an unreasonable and oppressive burden upon the intercourse between nations, that they should be compelled to investigate and determine, in the first instance, every personal offence committed by the citizens of the one against those of the other."[21]

"In international law, justice may be denied," says Sir Traver Twiss, "(1) By the refusal of a nation either to entertain the complaint at all, or to allow the right to be established before its tribunals; (2) or by studied delays and impediments, for which no good reason can be given, and which are in effect equivalent to a refusal; or (3) by an evidently unjust and partial decision."[22]

[18] For. Rel. 1903, 733; 6 Moore Int. L. D. 747.

[19] Bradford, 1 Op. Atty. Gen. 53.

[20] To the British Minister, April 18, 1793, 5 MS. Dom. Let. 88.

[21] To Mr. Shain, May 28, 1834, 26 MS. Dom. Let. 263.

[22] Law of Nations, pt. 1, p. 36.

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§ 489. Courts open for redress.—Intervention through diplomatic channels will not be made when the courts of a country are open for the redress of claims to property.[23] The United States will not consider, as grounds of interference, irregularities in the prosecution of an American citizen in Chile, not amounting to a denial of justice, or an undue discrimination against him as an alien.[24] But should a Chilean court refuse to hear testimony on behalf of an American citizen on trial for crime, and such refusal should be sustained by the Chilean government, the United States would consider such refusal as "a gross outrage to an American citizen, for which it will assuredly hold Chile responsible."[25]

[23] Mr. Foster, Secretary of State, to Mr. Mulcahy, February 21, 1893, 190 MS. Dom. Let. 406.

[24] Mr. Marcy, Secretary of State, to Mr. Starkevedther, August 24, 1855, MS. Inst. Chile, XV, 124.

[25] Mr. Conrad, Acting Secretary of State, to Mr. Peyton, chargé to Chile, October 12, 1852, MS. Inst. Chile, XV, 93. Mr. Gresham, Secretary of State, in an instruction to Mr. Ryan, Minister to Mexico, April 26, 1893 (MS. Inst. Mex. XXIII, 359), said: "Where complete reciprocal international equality is recognized, as it is fully recognized between the United States and Mexico, a necessary consequence thereof is that each country must as a rule admit the competency and the disposition of the courts of the other country to do complete justice to all litigants properly subject to their jurisdiction, regardless of nationality. This presumption in favor of the competency and the integrity of the courts is very strong and is not to be lightly ignored upon the application of disappointed litigants, seeking for diplomatic intervention. It is not meant to say that a palpable denial of justice to citizens of one country in the courts of the other, may not in extreme cases be made the subject of international demands. But the circumstances which may sanction diplomatic intervention as a matter of right in such cases, must be very cogent in order to overcome the presumption above referred to. This Department, moreover, entertains the opinion that something of an unusual character must have occurred to warrant even the use of the good offices or mere unofficial requests of our diplomatic representatives with foreign governments in behalf of American citizens, litigants in their courts. The bare fact of an adverse decision will not warrant it, and in all cases judicial remedies must be exhausted by appeal or otherwise, before executive interference is asked. The difficulties which would exist in the way of any executive action in this country, for the correction of alleged delinquencies in the conduct of the judicial tribunals should always be borne in mind."

In a note to Mr. Ten Eyck, Commissioner to Hawaii, August 28, 1848, MS. Inst. Hawaii, II, 1, Mr.

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§ **490. Montijo controversy.**—While the steamer "Montijo," which was owned by citizens of the United States, was on a voyage to Panama, she was, on April 6, 1871, seized and attacked by certain persons engaged in a revolution. The claims of the owners for reparation were referred to arbitration, and among other defenses urged was, that the act was committed by the state of Panama, and not by the United States of Colombia.

Buchanan, Secretary of the State, said: "In regard to the jurisdiction of the courts of independent nations over American citizens resident within their limits, it became necessary for me, on the 1st of February, 1848, to address a note to Mr. Osma the minister from Peru, which also received the sanction of the President and Cabinet. From it I make the following extract. 'Citizens of the United States whilst residing in Peru are subject to its laws and the treaties existing between the parties, and are amenable to its courts of justice for any crimes or offenses which they may commit. It is the province of the judiciary to construe and administer the laws, and if this be done promptly and impartially towards American citizens and with a just regard to their rights they have no cause of complaint. In such cases they have no right to appeal for redress to the diplomatic representative of their country, nor ought he to regard their complaints. It is only where justice has been denied or unreasonably delayed by the courts of justice of foreign countries—where these are used as instruments to oppress American citizens or to deprive them of their just rights—that they are warranted in appealing to their government to interpose.' All these are ancient and well-established principles of public law; and the quotations are made merely to show that they have received the formal sanction of this government."

Mr. Marcy, Secretary of State, speaking of the criminal procedure of Austria (MS. Inst. Austria, I, 105), said: "The system of proceeding in criminal cases in the Austrian government has, undoubtedly, as is the case in most other absolute countries, many harsh features, and is deficient in many safeguards which our laws provide for the security of the accused; but it is not within the competence of one independent power to reform the jurisdiction of others, nor has it the right to regard as an injury the application of the judicial system and established modes of proceedings in foreign countries to its citizens when fairly brought under their operation. All we can ask of Austria, and this we can demand as a right, is that, in her proceedings against American citizens prosecuted for offenses committed within her jurisdiction, she should give them the full and fair benefit of her system, such as it is, and deal with them as she does with her own subjects or those of other foreign powers. She cannot be asked to modify her mode of proceedings to suit our views, or to extend to our citizens all the advantages which her subjects would have under our better and more humane system of criminal jurisprudence."

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Mr. Fish, Secretary of State, in a note to the American Minister, said that the seizure was a piratical act, "for which it is expected that the authors will be held to be judicially accountable. The treaty stipulates that no such seizure shall be made, even by the Colombian authorities, without just compensation to the aggrieved parties. When, therefore, such an act is committed in the waters of that republic by unauthorized persons, the obligation of that government to make amends therefor may be regarded as unquestionable. You will accordingly apply for reparation in this case."[26] The controversy was finally submitted to arbitration. There was a disagreement as to liability between the arbitrators, and the final decision was rendered by the umpire, who, on July 25, 1875, rendered an award in favor of the claimants for $33,401.[27]

§ 491. **Federal government of Colombia responsible for acts of states.**—One of the reasons advanced by Colombia to escape liability was that the government of the Union could not be held answerable for the failure of the state of Panama to compensate the owners, because the Colombian government had no connection with private debts, especially with those having a vicious origin. To this contention the umpire replied that in his opinion the government of the Union had "a very clear and decided connection with the debts incurred by the states of the Union toward foreigners whose treaty rights have been invaded or attacked; and, secondly, that the debts so incurred by the separate states are in no way private, but, on the contrary, entirely public in their character." He said that it was true that treaties authorizing the residence of foreigners in Colombia, and defining and assuring their rights during such residence, were made with the general government, and not with the separate states of which the Union is composed.

§ 492. **Same practice in the United States.**—The same practice, he said, prevailed in the United States, in Switzerland, and in all countries in which the federal system is adopted. He held that if a treaty stipulation were violated, "it is evident that a recourse must be had to the entity with which the international engagements were made. There is no one else to whom appli-

[26] For. Rel. 1871, 230.

[27] 2 Moore's Int. Arb., 1427.

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cation can be directed. For treaty purposes the separate states are nonexistent; they have parted with a certain defined portion of their inherent sovereignty, and can only be dealt with through their accredited representative or delegate, the federal or general government." He stated, however, that admitting that this is the theory and the practice of the federal system, "it is equally clear that the duty of addressing the general government carries with it the right to claim from that government, and from it alone, the fulfillment of the international pact. If a manifest wrong be committed by a separate state, no diplomatic remonstrance can be addressed to it. It is true that in such a case the resident consular officer of a foreign power may call the attention of the transgressing state to the consequences of its action, and may endeavor by timely and friendly intervention on the spot to avoid the necessity of an ultimate application to the general government through the customary diplomatic channel; but should this overture fail, there remains no remedy but the interference of the federal power, which is bound to redress the wrong, and, if necessary, compensate the injured foreigner." He concluded by remarking that if this rule be correctly laid down, "It follows that in every case of international wrong the general government of this republic has a very close connection with the proceedings of the separate States of the Union. As it, and it alone, is responsible to foreign nations, it is bound to show in every case that it has done its best to obtain satisfaction from the aggressor."

§ 493. Constitution of Colombia prohibiting interference with states.—The argument was made in that controversy that by the Constitution of Colombia, the federal power was prohibited from interfering in the domestic disturbances of the states, and that it could not justly be made accountable for acts for which it had not the power, under the fundamental powers of that country, to prevent or punish. To this contention the umpire replied "that in such a case a treaty is superior to the Constitution, which latter must give way. The legislation of the republic must be adapted to the treaty, not the treaty to the laws. This constantly happens in engagements between separate and independent nations. For the purposes of carrying out the stipulations of a treaty, special laws are required. They are made *ad hoc*, even

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though they may extend to foreigners' privileges and immunities which the subjects or citizens of one or both of the treaty-making powers do not enjoy at home.

"That under such a rule apparent injustice may occasionally be committed is probably true. But it is more apparent than real It may seem at first sight unfair to make the federal power, and through it the taxpayers of the country, responsible, morally and pecuniarily, for events over which they have no control, and which they probably disapprove or disavow, but the injustice disappears when this inconvenience is found to be inseparable from the federal system. If a nation deliberately adopts that form of administering its public affairs, it does so with the full knowledge of the consequences it entails. It calculates the advantages and the drawbacks, and cannot complain if the latter now and then make themselves felt." [28]

§ **494. An embarrassing precedent.**—The United States has consistently disavowed responsibility for acts committed against foreigners by the inhabitants of a state, claiming that it has no power to prevent such acts, and they are purely matters of state cognizance. Nations, however, whose subjects have been the victims of such attacks can look to none but the national government for redress, and have insisted that it was the duty of the federal government to make reparation. It may be that the decision in the Montijo case will be regarded at some time as an embarrassing precedent, when the contention is made that the federal government is liable in no sense for an act committed within a state against foreigners possessing treaty rights.

§ **495. Department of State not a court of error.**—Errors in the legal proceedings not amounting to a denial of justice are not a ground for diplomatic intervention. As stated in 1886 by Mr. Bayard, Secretary of State, in a letter addressed to Mr. Morrow, member of Congress: "When application is made to this department for redress for the supposed injurious actions of a foreign judicial tribunal, such application can only be sustained on one of two grounds: (1) Undue discrimination against the petitioner as a citizen of the United States in breach of treaty

[28] 2 Moore's Int. Arb., 1439.

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obligations, or (2) violation of those rules for the maintenance of justice in judicial enquiries which are sanctioned by international law. There is no proof presented in Captain Caleb's case establishing either of these conditions. It is true that it is alleged that there was a failure of justice, and were this Department sitting as a court of error, it is not improbable that there are points in the proceedings complained of in the Mexican adjudication before us which might call for reversal. But this Department is not a tribunal for the revision of foreign courts of justice, and it has been uniformly held by us that mistakes of law, or even of facts, by such tribunals, are not grounds for our interposition unless they are in conflict, as above stated, either with treaty obligations to citizens of the United States or settled principles of international law in respect to the administration of justice."[29]

§ **496. Demands upon the United States.**—There is no statute of the United States, as we have seen, making it a crime to attack a foreigner residing in the United States, who is protected by the provisions of a treaty, and the offense is crime only against the laws of the state in which the act was committed. But a treaty is made by the United States in its sovereign capacity as a nation, and no treaty can be made by an individual state with a foreign power. A foreign nation is compelled to answer for the wrongful conduct of its citizens toward others, and where a similar act is committed in the United States, that nation looks to the federal government for redress. The United States has uniformly denied its liability, but has in many instances paid an indemnity for outrages committed upon the subjects of other nations. Some of these cases we shall proceed to notice.

§ **497. Destruction of French privateers at Savannah.**—The French privateers "La Franchise" and "La Vengeance" were in the port of Savannah, Georgia, and on November 15, 1811, some of their seamen engaged in a quarrel with some American sailors in a house of ill-fame. One of the Americans was killed and a French seaman was fatally wounded. As a consequence a mob arose, which set fire to and destroyed the privateers and killed

[29] 159 MS. Dom. Let. 99.

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several of the French seamen, in spite of the efforts of the police and military authorities to prevent it. The French minister at Washington considered the attack thus made as one upon the flag of France, and although the state of Georgia was willing and offered to make reparation, he demanded that the guilty be prosecuted and exemplarily punished, that satisfaction be tendered for insult to the flag, and that an indemnity of 170,000 francs be given to the owners of the vessels.

§ **498. Contention of France.**—It was contended on the part of France that where damages are caused as the result of popular uprisings, the damages sustained are to be compensated for either by the district in which they were received, or by the government of the country, which, it was claimed, should secure strangers from acts of violence of this character, as they assume the nature of public acts on account of the number of persons engaged. Our government stated that the case was manifestly different from those in which the United States was then demanding indemnity, where the injuries complained of were committed under express orders of the government of France; but, it was added, that if on examination, there was found to be any ground for a fair demand on the justice of the United States government, it would no doubt make proper reparation. A demand was also presented for 70,000 francs for the burning, on the night of April 15, 1811, at Norfolk, Virginia, by a mob incited it was asserted by false reports circulated against the vessel, and it was stated that the offenders had remained unpunished.[30]

§ **499. Position of the United States.**—Our government, in response, stated that it had no information as to the case, but that it seemed clear that there was no principle of public law rendering the government responsible, inasmuch as the act apparently was committed with "perfect secrecy under cover of the night, excluding thereby all opportunity for the protective interposition of the laws or of the public authority."[31]

All claims between the two countries were mutually settled by the convention concluded July 4, 1831, by which it was re-

[30] Count Sebastiani to Mr. Rives, June 15, 1831, H. Ex. Doc. 147, 22 Cong. 2 Sess. 191.

[31] Mr. Rives to Count Sebastiani, June 19, 1831, H. Ex. Doc. 22 Cong. 2 Sess. 201, 203.

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cited that in consideration of the payment of 1,500,000 francs the United States was liberated from all claims either by France or her citizens for supplies, accounts, or "unlawful seizures, captures, detentions, arrests, or destruction of vessels, cargoes, or their property."[82]

§ 500. **New Orleans and Key West riots in 1851.**—The Spanish authorities in Cuba captured a filibustering expedition, executed some of the members and detained others as prisoners. On the receipt of this news at New Orleans, on August 21, 1851, a Spanish paper published in that city, known as the "La Union," issued an extra giving an account of the transaction and commenting upon it. A mob attacked the newspaper office, practically destroying it, raided the Spanish consulate, and demolished some Spanish coffee houses and tobacco stores. The paper had, by placards posted up in the morning, been threatened with an attack in the evening, but the raiding really took place between 3 and 4 o'clock in the afternoon, after the issue of the extra. No police were present at the occurrence, and no arrests followed. During the same afternoon, between 5 and 6 o'clock, the office of the Spanish consul was attacked. The recorder, accompanied by two or three police officers, went to the scene and found the mob engaged in destroying furniture. The rioters, under his persuasion, withdrew, but carried away with them the consul's sign, which they burned in a public square, and within an hour afterward returned and forced their way again into the office, which in the meantime had been nailed up but left with no guard to protect it. On the second attack, the rioters, without any interference from the municipal authorities, destroyed all the furniture in the office, cast the archives of the consulate into the street, defaced the portraits of the Queen of Spain and of the captain-general of Cuba, and tore into pieces the flag of Spain, which was in the office. During the night other disturbances occurred and several of the rioters were arrested, but apparently none who had participated in the attack upon the consul's office. The outbreak was a sudden one, for which the public authorities were not prepared. The police checked the rioters wherever they made the attempt; the mob made no violent

[82] 6 Moore's Int. Law Dig. 809; 23 MS. Dom. Let. 541.

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resistance to the officers and did not attempt to rescue any person arrested.

The consul sought refuge in the house of a friend, and later departed for Havana, intrusting Spanish interests to the British and French consuls. Complaint was made by the Spanish Minister that protection was not given to the consul, but that he was left to "the mercy of a ferocious rabble."

§ 501. **Distinction between rights of consul and resident foreigners.**—Mr. Webster drew a distinction between the rights of a foreign consul, who is a public officer residing in the United States under the protection of the government, and the rights of foreigners who have come into this country to mingle with our citizens and to pursue their private business. The consul, he admitted, might claim special indemnity, while foreign residents are entitled to such protection as is afforded to our own citizens.[33] President Fillmore, in his message, laid before Congress the facts and the extent of the pecuniary loss sustained by the consul, so that it might make provision for such indemnity as a just regard for the honor of the nation and the respect due to a friendly power might seem to require. He also called attention to the deficiency in the law in not providing sufficiently for the protection or punishment of consuls.[34]

§ 502. **Appropriation by Congress.**—Congress, on August 31, 1852, appropriated $25,000 "to make compensation to the Spanish consul and other subjects of Spain residing at New Orleans and subjects of Spain at Key West, for losses occasioned by violence in the year 1851, arising from intelligence then recently received at those places of the execution of certain persons at Havana who had recently invaded the island of Cuba."[35] The President, however, by an act passed March 3, 1853, was requested to investigate the losses in question, and payment should be made. The act provided for such losses as he should certify to have been suffered.[36]

§ 503. **Explanations of appropriation.**—The explanation given by members of the Committee on Foreign Relations for making

[33] 6 Webster's Works, 509, 511.
[34] Richardson's Messages, V, 118.
[35] 10 U. S. Stats. 89.
[36] 10 Stats. 262, 263.

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the appropriation for the private subjects of Spain was that they wished to show a mark of courtesy and respect for the magnanimity of the Queen of Spain in liberating those individuals who had been captured in Cuba and held as prisoners, and permitting them to return home after they had been sent across the ocean. It may be remarked that provision is now made in the Revised Statutes for the protection of public ministers.[37]

Mr. Webster, in his letter to Senor Calderon de la Barca, Spanish Minister, said: "The assembling of mobs happens in all countries; popular violences occasionally break out everywhere, setting law at defiance, trampling on the rights of citizens and private men, and sometimes on those of public officers, and the agents of foreign governments especially entitled to protection. In these cases the public faith and national honor require, not only that such outrages should be disavowed, but also that the perpetrators of them should be punished wherever it is possible to bring them to justice; and further, that full satisfaction should be made, in cases in which a duty to that effect rests with the government, according to the general principles of law, public faith, and the obligations of treaties."

§ **504. Damages for destruction of property.**—Mr. Webster referred to the opinion expressed by the Spanish minister that not only ought indemnification be made to the consul for injury and loss of property, but that reparation was also due from the United States to those Spaniards residing in New Orleans whose property the mob had injured or destroyed, and stated that while the government had manifested a willingness and determination to perform every duty which one friendly nation has a right to expect from another in cases of this kind, it supposed that the rights of the Spanish consul, who was a public officer residing in the United States under the protection of the government, were quite different from those of the Spanish subjects who had come into the country to mingle with our citizens. "The former," said he, "may claim special indemnity; the latter are entitled to such protection as is afforded to our own citizens. . . . . The

[37] Rev. Stats., secs. 4062-4064; Cong. Globe 1851-52, vol. 24, pt. 2, p. 2341; H. Ex. Doc. 113, 32 Cong. 1 Sess.; H. Ex. Doc. 32 Cong. 1 Sess.; 6 Moore's Int. Law Dig. 815.

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President is of opinion, as already stated, that, for obvious reasons, the case of the consul is different, and that the Government of the United States should provide for Mr. Laborde a just indemnity; and a recommendation to that effect will be laid before Congress at an early period of its approaching session. This is all which it is in his power to do. The case may be a new one; but the President, being of opinion that Mr. Laborde ought to be indemnified, has not thought it necessary to search for precedents."[38]

[38] Continuing, he said: "In his annual message of December 2, 1851, President Fillmore said: 'Ministers and consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they faithfully discharge their respective duties and are guilty of no violation of our laws. This is the admitted law of nations and no country has a deeper interest in maintaining it than the United States. Our commerce spreads over every sea and visits every clime, and our ministers and consuls are appointed to protect the interests of that commerce as well as to guard the peace of the country and maintain the honor of its flag. But how can they discharge these duties unless they be themselves protected? And if protected it must be by the laws of the country in which they reside. And what is due to our own public functionaries residing in foreign nations is exactly the measure of what is due to the functionaries of other governments residing here. As in war the bearers of flags of truce are sacred, or else wars would be interminable, so in peace ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station. In view of these important principles, it is with deep mortification and regret I announce to you that during the excitement growing out of the executions at Havana the office of her Catholic Majesty's consul at New Orleans was assailed by a mob, his property destroyed, the Spanish flag found in the office carried off and torn in pieces, and he himself induced to flee for his personal safety, which he supposed to be in danger. On receiving intelligence of these events I forthwith directed the attorney of the United States, residing at New Orleans to inquire into the facts and the extent of the pecuniary loss sustained by the consul, with intention of laying them before you, that you might make provision for such indemnity to him as a just regard for the honor of the nation and the respect which is due to a friendly power might, in your judgment, seem to require. The correspondence upon this subject between the Secretary of State and her Catholic Majesty's minister plenipotentiary is herewith transmitted.' "

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§ 505. **The steamer "Caroline."**—In 1837 an insurrection occurred in Canada, and along the Canadian border there were many manifestations of sympathy with the insurgent cause. While the United States attempted strenuously to enforce the neutrality laws, much difficulty was experienced in the attempt, for the reason that the insurgents sought a refuge in the United States when defeated. Speeches were made in various cities of New York by the insurgent leaders, who appealed to the public for volunteers and munitions of war. On the 29th of December of that year a small steamer, the "Caroline," was destroyed, presumably by a British force on the Canadian side. Mr. Forsyth, Secretary of State, wrote to the British Minister at Washington, complaining of the destruction of property and the assassination of American citizens on the soil of New York. In reply it was stated that the "Caroline" was engaged in piracy, and that the laws of the United States were not enforced along the frontier, but were openly violated, and that the "Caroline" was destroyed in necessary self-defense. A demand for reparation was made May 22, 1838, by the American Minister of the United States at London, and Lord Palmerston acknowledged its receipt, promising consideration.[39]

§ 506. **Arrest of McLeod.**—Alexander McLeod, while in an intoxicated condition, had boasted of active participation in the destruction of the vessel, and in March, 1841, he was arrested in New York on a charge of murder. The British government then assumed responsibility for the destruction of the steamer, claiming that it was a public act of force in self-defense by those engaged in the British service, and on this ground demanded the release of McLeod. McLeod was indicted, but on the trial was acquitted on proof of an alibi. While the trial was in progress he applied to a state court for a writ of *habeas corpus*, alleging that he acted in a governmental capacity, and that as the controversy was in a state of adjustment by the diplomatic representatives of the government concerned, he was not subject to the local jurisdiction of the courts of New York. The court denied the writ, and remanded him for trial, saying: "Diplomacy

[39] See 1 Phillmore's Int. Law, 3d ed., 315; Hall's Int. Law, 4th ed., 283.

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is not a judicial, but executive function, and the objection would come with the same force whether it were urged against proceeding in a court of this state, or the United States. Whether an actual exertion of the treaty-making power, by the President and Senate, or any power delegated to Congress by the federal constitution, could work the consequences contended for, we are not called upon to inquire; whether the executive of the nation (supposing the case to belong to the national court), or the executive of this state might not pardon the prisoner, or direct a *nolle prosequi* to be entered, are considerations with which we have nothing to do. The executive power is a constitutional department in this, as in every well-organized government, entirely distinct from the judicial. And that would be so, were the national government blotted out, and the state of New York left to take its place as an independent nation. . . . . Upon the principle contended for, every accusation which has been drawn in question by the executive power of two nations can be adjusted by negotiation or war only. The individual must go free, no matter to what extent his case may have been misapprehended by either power. No matter how criminal he may have been, if his country, though acting on false representations of the case, may have been led to approve of the transaction and negotiate concerning it, the demands of criminal justice are at an end."[40]

§ **507. Diplomatic action.**—The case was finally disposed of through diplomatic channels, it being admitted on the part of the United States that the employment of force might have been justifiable by the necessity of self-defense, but the existence of such necessity was denied, while on the part of Great Britain it was maintained that an excuse for what took place was furnished by the circumstances, but at the same time an apology was made for the invasion of the territory of the United States.[41]

[40] People v. McLeod, 25 Wend. 483, 37 Am. Dec. 328.

[41] H. Ex. Doc. 64, 25 Cong. 2 Sess.; H. Ex. Doc. 74, 25 Cong. 2 Sess.; Message of April 4, 1838; H. Ex. Doc. 302, 25 Cong. 2 Sess.; Message of February 5, 1839, H. Ex. Doc. 183, 25 Cong. 3 Sess.; Message of December 28, 1840, H. Ex. Doc. 33, 26 Cong. 2 Sess.; H. Report, 162, 26 Cong. 2 Sess.; Message of March 8, 1842, H. Ex. Doc. 128, 27 Cong. 2 Sess.; Message of January 23, 1843, S. Ex. Doc. 99, 27 Cong. 3 Sess.

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§ 508. **Opinion of John Quincy Adams.**—Mr. John Quincy Adams declared, in the House of Representatives, that he took it that the "Caroline" was arrayed against the British government, and that the parties concerned in it were employed in acts of war against it, and that he did not subscribe to the opinion expressed by the court in New York that no act of war had been committed. "Nor do I subscribe to it that every nation goes to war only on issuing a declaration or proclamation of war. This is not the fact. Nations often wage wars for years, without issuing any declaration of war. The question is not here upon a declaration of war, but acts of war. And I say that in the judgment of all impartial men of other nations, we shall be held as a nation responsible; that the 'Caroline,' there, was in a state of war against Great Britain; for purposes of war, and the worst kind of war—to sustain an insurrection; I will not say rebellion, because rebellion is a crime, and because I have heard them talked of as patriots."[42]

§ 509. **Principle of public law admitted.**—Mr. Webster, Secretary of State, in a note to Lord Ashburton, the British Minister, said that the President saw, with pleasure, that he fully admitted those great principles of public law, applicable to cases of this kind, which the government of the United States had expressed, "and that on your part, as on ours, respect for the inviolable character of the territory of independent states is the most essential foundation of civilization. And while it is admitted on both sides that there are exceptions to this rule, he is gratified to find that your Lordship admits that such exceptions must come within the limitations stated and the terms used in a former communication from this department to the British plenipotentiary here. Undoubtedly it is just that, while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'

"Understanding these principles alike, the difference between the two governments is only whether the facts in the case of the 'Caroline' makes out a case of such necessity for the purpose of

[42] 2 Benton's Thirty Years' View, 289.

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self-defense. Seeing that the transaction is not recent, having happened in the time of one of his predecessors, seeing that your Lordship, in the name of your government, solemnly declares that no slight or disrespect was intended to the sovereign authority of the United States; seeing that it is acknowledged that, whether justifiable or not, there was yet a violation of the territory of the United States, and that you are instructed to say that your government consider that as a most serious occurrence; seeing, finally, that it is now admitted that an explanation and apology for this violation was due at the time; the President is content to receive these acknowledgments and assurances in the conciliatory spirit which marks your Lordship's letter, and will make this subject, as a complaint of violation of territory, the topic of no further discussion between the two governments."[43]

§ 510. **Federal statute enacted.**—There was no statute in existence at the time of the trial of McLeod by which the federal government could prevent the trial in a state court of a person who was acting, or claiming to act, under the direction of a foreign government. To give the federal courts the power to examine into such cases and, if the facts justified, to discharge on *habeas corpus*, a statute was enacted conferring jurisdiction upon the federal courts, and the substance of this statute is now found in the Revised Statutes. It is provided that the several justices and judges of the federal courts shall have power to grant writs of *habeas corpus*, but that the writ shall in no case extend to a prisoner in jail unless, "being a subject or citizen of a foreign state, and domiciled therein," he "is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations."[44]

§ 511. **Attacks on Chinese at Denver.**—At Denver, Colorado, on November 10, 1880, a lawless mob attacked certain Chinese residents of that city, killed one and injured others, at the same time destroying much of their property. The mob obtained a mastery over the constituted authorities and at first directed their

[43] 6 Webster's Works, 301, 302. [44] Rev. Stats., sec. 753.

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attack against the peaceable and law-abiding citizens of the community. The Chinese Minister, in asking that the federal government should extend protection to the Chinese at Denver, and to see that those guilty of the crime should be arrested and punished, also stated that "it would seem to be just that the owners of property wantonly destroyed shall in some way be compensated for their losses."

§ 512. **Views of Mr. Evarts, Secretary of State.**—Mr. Evarts, Secretary of State, while assuring the Chinese Minister that the protection of the government would be fully given to Chinese residents in the country to the same extent as it is afforded to her own citizens, declared: "As to the arrest and punishment of the guilty persons who composed the mob at Denver, I need only remind you that the powers of direct intervention on the part of this Government are limited by the Constitution of the United States. Under the limitations of that instrument, the Government of the Federal Union cannot interfere in regard to the administration or execution of the municipal laws of a State of the Union, except under circumstances expressly provided for in the Constitution. Such instances are confined to the case of a State whose power is found inadequate to the enforcement of its municipal laws and the maintenance of its sovereign authority; and even then the Federal authority can only be brought into operation in the particular state in response to a formal request from the proper political authority of the State. It will thus be perceived that so far as the arrest and punishment of the guilty parties may be concerned, it is a matter which in the present aspect of the case belongs exclusively to the government and authorities of the State of Colorado."[45]

§ 513. **Compensation to owners of property.**—Mr. Evarts declared, that frequently lawless persons banded together and made up a force sufficient in power and numerical strength to defy temporarily the power of the local authorities, and stated that such incidents are peculiar to no country. In the case under

[45] For. Rel. 1881, 319. Mr. Evarts also called attention to the fact that the first care of the authorities and citizens of Denver was the protection and safety of the Chinese residents.

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consideration, it appeared, he said, that the local authorities brought into requisition all the means at their command for the suppression of the mob, and that these means proved so effective that within a short time regular and lawful authority had been restored and the mob subdued. Referring to the demand for compensation, we can best give his views in his own language:

"Under circumstances of this nature when the Government has put forth every legitimate effort to suppress a mob that threatens or attacks alike the safety and security of its own citizens and the foreign residents within its borders, I know of no principle of national obligation, and there certainly is none arising from treaty stipulation which renders it incumbent on the Government of the United States to make indemnity to the Chinese residents of Denver, who in common with citizens of the United States, at the time residents in that city, suffered losses from the operations of the mob. Whatever remedies may be afforded to the citizens of Colorado or to the citizens of the United States from other States of the Union resident in Colorado for losses resulting from that occurrence, are equally open to the Chinese residents of Denver who may have suffered from the lawlessness of the mob. This is all that the principles of international law and the usages of national comity demand."

Mr. Evarts said that the view just expressed proceeded upon the proposition that Chinese residents were to receive the same measure of protection and vindication under judicial and political administration of their rights as citizens of this country, and hence it was not necessary to discuss the extent or true meaning of the treaty obligations on the part of the Government to Chinese residents.[46]

§ 514. **Attack on Chinese at Rock Springs.**—A mob, numbering approximately one hundred and fifty persons, attacked, on

[46] For. Rel. 1881, 319. Mr. Bayard, Secretary of State, in a letter addressed on June 1, 1885, to Mr. West, British Minister, stated the proposition "that when the courts of justice are open to a foreigner in a State, the Federal Executor will not take cognizance of his complaint, was maintained by Mr. Evarts and by Mr. Blaine on December 30th, 1880, and March 25, 1881, when declining to accept for the Executive jurisdiction over a claim for damages to certain Chinese inflicted by a mob in Colorado in November, 1880." For. Rel. 1885, 150, 456.

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September 2, 1885, the Chinese settlement at Rock Springs, Wyoming, ordered them to leave their homes, and before they were given an opportunity to do so opened fire upon them, killed twenty-eight and wounded fifteen more or less severely. Some of these were shot while they were still in their houses, or while they were attempting to run away from the rioters, who set fire to the houses, and in consequence the entire Chinese village was burned to the ground. The amount of property destroyed or appropriated by the rioters was placed at $147,748.74. United States troops were sent to the scene after the massacre, thus probably preventing a further loss of life and property. The Chinese Minister, in his letter of complaint, stated that the attack was unprovoked; that the civil authorities did not attempt to prevent or suppress the riot; that the inquest held by them was a burlesque; and that there was no probability that any of the offenders would ever be brought to punishment by the local authorities. He asked for the punishment of the guilty, indemnity for all losses and injuries sustained, and the adoption of suitable measures for the protection from similar attacks of Chinese residing in Wyoming and elsewhere in the United States.

§ 515. **Case of territory.**—He referred to the doubts expressed by Mr. Evarts and Mr. Blaine as to the obligation of the United States to make pecuniary indemnity to the Chinese sufferers by the mob at Denver, and claimed that the reasons advanced why the federal government should not be liable when the acts occurred within a state did not apply in the case of a territory, but declared that there was a broader view, and called attention to the fact that in 1858 the Chinese provincial and local authorities had, upon the intervention of the diplomatic and consular representatives of the United States, indemnified American citizens in many cases for losses occasioned by riots and violence, and that in that year a convention was agreed upon under which, "in full liquidation of all claims of American citizens," the Chinese government paid over to the United States the sum of $735,258.97, which, it afterward transpired, was greater than the amount of the claims, and the balance unexpended was returned to China by the United States. This settlement included claims for losses sustained by mob violence, robbery and other lawless acts of individual Chinese subjects.

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§ 516. American demands on China.—The Chinese Minister also adverted to the fact that since this settlement, the American diplomatic and consular representatives, acting under their instructions, had constantly and uniformly intervened with the Chinese Imperial and local authorities in all cases, coming to their notice, of losses or injuries suffered by American citizens from mob violence, and that the Chinese authorities were requested to punish the offenders and also to make proper indemnity to the American citizens for all their losses. The Chinese Government, he said, had in such cases, either acting directly, or through the local authorities, paid all losses caused by the burning or destruction of houses by mobs, and in some cases had compelled the local authorities to rebuild or repair the houses injured or destroyed. His government had also, he continued, made indemnity for petty thefts where those guilty were not known or could not be arrested, and had, in many other cases, caused the return of money or the payment of indemnity. He also referred to the action taken by the United States in the case of the riots at New Orleans and Key West in 1850, when Congress authorized the indemnification of Spanish subjects for losses sustained, and, while he admitted that this was done as a voluntary act of goodwill, he claimed that it went to show the existence of high principles of equity and national comity which rose above the narrow limits of statutory law and which controlled the actions of nations; and suggested that if in the past a way had been found by which the obstructions referred to by Secretaries Evarts and Blaine had been overcome as to the subjects of other nations, he did not doubt that a method equally efficacious would be devised for the relief of the subjects of China.[47]

[47] For. Rel. 1886, 101. He cited instances where reparation had been made, in one of which the United States government had sent its consuls and warships to demand the trial of rioters where a single American had suffered loss amounting to less than five hundred dollars, and had required the punishment of the guilty in the presence of the representatives of the American government, and the giving of bonds by the rioters to insure the future security of American citizens. To secure the return of sums as small as seventy-three dollars stolen from American citizens, the Minister plenipotentiary of the United States had intervened with the imperial government, and representatives of our government had asked for the destruction of points in the interior districts which were apt to incite mob violence; the destruction

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§ 517. **Views of Mr. Bayard, Secretary of State.**—Mr. Bayard, Secretary of State, denied emphatically all liability to indemnify individuals of any race or country for loss growing out of public law, and he declared, with equal emphasis, "that just and ample opportunity is given to all who suffer wrong and seek reparation through the channels of justice as conducted by the judicial branch of our Government." "The system of government," he said, "prevailing in the United States and known to China creates several departments, and where an act has not been committed under official authority, in pursuance of governmental orders, the question of reparation for losses to individuals must be determined by the judicial branch." He added that while all liability was disclaimed, and solely from a sentiment of generosity, it might reasonably be a subject for the benevolent consideration of Congress, with the distinct understanding that no precedent should be created to grant pecuniary aid to the sufferers to extent of the value of the property of which they were deprived.[48]

§ 518. **Incident devoid of national character.**—Mr. Bayard said, that on neither side was there any representative of the government of China, or of the United States or of the territory of Wyoming, and therefore the incident was devoid of both official and national character. He referred to the attempt of the Chinese Minister to show by argument and analogy that there rested upon the United States a singular and exceptional obligation toward China reciprocal with the contractual obligations of China with respect to citizens of the United States resorting thither, and stated that before weighing this *ad hominem* argument, it was necessary to know where the conventional argument actually places us, and proceeded:

"The several treaties of 1844, 1858, 1868, and 1880 are acts *in pari materia*, and no subsequent one of them abrogates those

of block type and the punishment of those having it in possession. These acts of intervention, he said, had been independent of any treaty stipulations to that effect, and that it could not be believed in so doing that the United States had required of China what it would not expect from a European or American state under the rules of the equitable code regulating the intercourse of civilized nations.

[48] For Rel. 1886, 158; H. Ex. Doc. 102, 49 Cong. 1 Sess.; Moore's Int. Law Dig. 833.

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which are prior in date. There have been successive modifications, extensions, or substitutions as to special subjects, but always in express revival and renewal of pre-existing treaties; and, unless abrogated in express terms or repealed impliedly by the adoption of new and inconsistent features, they all remain in force. Upon those premises, and passing all the personal and residential stipulations in review, we find restrictions expressly recognized throughout all the treaties which prove the inability to provide reciprocity, by reasons of the totally variant basis on which the administrative functions and powers of the two countries are conducted."

§ **519. China closed to residence.**—Mr. Bayard called attention to the fact that until 1868 no right of immigration of Chinese subjects to the United States was ever formally extended and said: "None was, perhaps, needed, for, under our free, popular Government, and in the absence of any restrictive legislation, our territory was and is equally open to all aliens. It was altogether different in China. That country was closed to alien residence as by a wall. A specific right had to be conventionally created before this exclusion could be modified. To certain classes of citizens of the United States the treaty of 1844 granted carefully restricted rights to visit and sojourn in China, but in every one of the articles which treats of transient or permanent right of residence appears the qualification that it is for the purposes of trade."[49]

[49] Continuing, he said: "Article I applies to our citizens 'resorting to China *for the purposes of commerce.*' Article III permits Americans to frequent certain specified ports, 'and to reside with their families *and trade there.*' Article IV related to 'citizens of the United States *doing business* at the said' ports. Article V refers to 'citizens of the United States *lawfully* engaged in *commerce.*' The important Article XIX, in regard to protection, speaks of 'citizens of the United States in China *peaceably attending to their affairs,*' and by 'their affairs' we may regard the 'lawful' commerce elsewhere spoken of in the treaty as having been uppermost in the minds of the negotiators. Not merely was the purpose of their sojourn restricted, but citizens of the United States could not, under Article XVII, lawfully transgress certain residential limits. Even within those limits they were not free to select the sites for their 'houses and places of business, and also hospitals, churches and cemeteries.' The 'merchants' of the United States were not to unreasonably insist on particular spots for those objects. Their residence was expressly conditioned on its

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§ 520. No reciprocity intended.—Mr. Bayard stated that in all the years in which diplomatic relations had existed with China there was no reciprocity of treatment of the citizens of one country within the jurisdiction of the other, and he observed there could not be, because the government of China had so restricted the privileges which it conceded as to make reciprocity impossible on

being acceptable to the native inhabitants. The treaty says, and I am sure you will recognize the force of this provision: 'The local authorities of the two Governments shall select in concert the sites for the foregoing object, *having due regard for the feelings of the people in the location thereof.*'

"And of that found at the close of the same Article XVII: 'And in order to *the preservation of the public peace*, the local officers of the Government at each of the five ports shall, in concert with the consuls, define the limits *beyond which it shall not be lawful for citizens of the United States to go.*'

"The impracticability of maintaining efficient police protection in many portions of every widely extended domain was recognized by the Chinese Government when they expressly guarded against liability in the closing paragraph of Article XXIV of the treaty of 1844, as follows: 'But if, by reason of the extent of territory and numerous population of China, it should in any case happen that the robbers cannot be apprehended or the property only in part recovered, then the law will take its course in regard to the local authorities, but the Chinese Government will not make indemnity for the goods lost.'

"Article XII of the treaty of 1858 is a substantial reaffirmation of these conditions. And it is to be noted that this treaty of 1858, while re-enacting many of the provisions of that of 1841, and passing over others, in no place intimates any enlargement of the residential class of unofficial American citizens to include others than merchants and their families within the narrow limits aforesaid. Ten years later we find the Burlingame treaty opening with the significant declaration that the object of preceding treaties has been to give aliens certain restricted privileges of resort and residence in particular localities 'for purposes of trade.' Article V appears to extend the purposes of residence and resort by including 'curiosity' as a motive; but even this extension is incidental to the enunciation of a principle, so that laws may be passed, not to guarantee 'free migration and emigration' without limit, but to prohibit involuntary emigration—in other words, to suppress the labor and coolie traffic.

"Article VII permits Americans to establish schools in China, and by implication includes American teachers in the classes admitted to restricted residence. In this, as in the other treaties, there is nothing to offset the idea of continued restriction, for Article VI, which gives to citizens of the United States visiting or residing in China, 'the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation,' neither creates nor extends any right

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the part of the United States, unless it should take the form of retaliation, which he said, under our system of laws, was impracticable. The treaty of 1880, he declared, was absolutely unilateral, and conveyed no hint of reciprocity. He called attention to the second article of this treaty, which gave to Chinese teachers, students, merchants and those actuated by motives of curiosity, and to the Chinese laborers, who, at that date, were in the United States, the right to "go and come of their own free will and accord," and in addition entitled them to the same treatment as the citizens or subjects of the most favored nation, and said: "I refrain from asking you to point out to me any responsive position in any of our treaties with China which guarantees to American teachers, students, merchants, curiosity seekers, and laborers the right to 'go and come of their own free will and accord' throughout the length and breadth of China, 'without regard to the feelings of the people' in the localities whither they may resort."[50]

of alien sojourn, but rather confirms the announced determination of China to reserve all such rights not expressly granted.

"To sum up, as the treaties stand, American citizens not of diplomatic or consular office may resort to China for trade, for curiosity, or as teachers, and then only to certain carefully limited localities, 'having due regard to the feelings of the people in the location thereof.' If the citizens or subjects of any other power should be granted other or greater privileges, then the citizens of the United States will have equal treatment.

"On the other hand, Chinese subjects were at all times free between 1844 and 1868 to come to the United States and travel or sojourn therein, pursuing whatever lawful occupation they might see fit to engage in, without the need of treaty guaranty. The sixth article of the Burlingame treaty created no privilege in their behalf; it simply recorded an existing fact; for the Chinese were then as free to visit and sojourn in the United States as any other aliens were, and no law of regulation or inhibition was upon our statute-books."

[50] He then continued: "Passing from the question of reciprocity, whether in its sentimental or contractual aspects, to the question of the actual guaranty stipulated by the United States to Chinese of all classes, including laborers within their jurisdiction, and of the responsibilities of this Government in the matter, we find that in the treaty of 1868, by its sixth article, the United States for the first time established, as a treaty right, the theretofore consuetudinary privilege of emigration of Chinese to this country. That article says: 'Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.'

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§ 521. System of American government known to China.—The system of American government prevailing in the United States written in its Constitution was known, said Mr. Bayard, to China, at the time the treaties were entered into. Under this government, several departments have been created, whose functions are distinct. The judicial branch must settle the question of liability for reparation or indemnity for losses to individuals in

"This is renewed, with definition and limitation of the particular classes of Chinese, to which it is applicable, in the second article of the treaty of 1880. What is the substantial and full intent and meaning of these provisions as laid down in 1868, and again with special definition in 1880? What 'most favored nation' is to be taken as a test and for the purpose of comparing the rights of its citizens or subjects in the United States with those of China? To constitute a special favor between nations it must exist in virtue of treaty or law, and be extended in terms to a particular nation as a nation. Applying this test, the citizens or subjects of no nation (unless it be those of China) have any special favor in the way of personal treatment shown them in the United States. All are treated alike, the subjects of the most powerful nations equally with others. An Englishman, a Frenchman, a German, a Russian, is neither more or less favored than one of any other nationality.

"Tried by this test, will it be denied that the public and local laws throughout the United States make no distinction or discrimination unfavorable to any man by reason of his Chinese nationality, except only those Federal laws regulating, limiting and suspending Chinese immigration which have been enacted in conformity with the express provisions of the treaty of 1880?

"What are the duties of the Government of the United States under that treaty towards Chinese subjects within their jurisdiction?

"The Chinese subjects now in the United States are certainly accorded all the rights, privileges, immunities and exemptions which pertain to the citizens and subjects of the most favored nation, as is provided in the second article of the treaty. They are suffered to travel at will all over the United States, to engage in any lawful occupation, and to reside in any quarter which they may select, and there is no avenue to public justice or protection for their lives, their commercial contracts, or their property in any of its forms which is not equally open to them as to the citizens of our own country.

"The same laws are administered by the same tribunals to Chinese subjects as to American citizens, save in one respect, wherein the Chinese alien is the more favored, since he has the right of option in selecting either a State or a Federal tribunal for the trial of his rights, which, in many cases, is denied for residential causes to our own citizens; and he may even at will remove his cause from a state to a Federal court.

"Thus, I find in the public press the announcement that Wing Hing, on behalf of himself and others, Chinese subjects, has lately brought suit in the United States circuit court to recover $132,000 from the city of

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all cases where the act complained of has been committed under official authority. He stated that "The doctrine of the nonliability of the United States for the acts of individuals committed in violation of its laws is clear as to acts of its own citizens, and *a fortiori* in respect of aliens who abuse the privilege accorded them of residence in our midst by breaking the public peace and infringing upon the right of others, and it has been correctly and authoritatively laid down by my predecessors in office," and to that doctrine, he stated, "The course of this government furnishes no exception." Referring to the New Orleans riot of 1850, he said that nothing could be clearer than the enunciation of the doctrine of the nonliability of the government. "While denouncing such outrages as disgraceful and in criminal violation of law and order, it was emphatically denied that the acts in question created any obligation on the part of the United States, arising out of the good faith of nations toward each other, for the losses thus occasioned by and to individuals." [51]

Eureka, Humboldt County, California, for loss of property by the action of a mob in February of last year. A citizen of that State would have been compelled to resort to a State tribunal, without appeal beyond the jurisdiction of the State, whereas the Chinese plaintiff in question can carry his case on appeal to the Supreme Court at Washington, thus divesting his rights from all adverse chance of local prejudice. . . . .

"The provision of an organized and in some cases privileged forum excludes the idea of direct recourse by the alien to other means of obtaining justice or redress. Your note argues that direct recourse to administrative or executive settlement is open to citizens of the United States in China, and instances are cited to show this. Surely, this rather proves that to the alien in China no such judicial forum is secured as to aliens in the United States.

"The extraterritorial tribunals established for their own citizens or subjects by all the powers in treaty relations with China are, in principle and from the reason of the thing, incompetent to adjudicate questions touching the liability of China to aliens. In default of Chinese tribunals admittedly competent to take cognizance of the causes of foreigners, what alternative remains besides denial of justice or resort to diplomatic settlement?"

[51] Further discussing the subject he proceeded: "Neither is there a parity between the Spanish incident of 1850 and the recent riot and massacre of the Chinese at Rock Springs. The essential feature of the first is wholly wanting in the second. The emblem of Spanish nationality had suffered an affront in a city of the United States. The special immunity attaching to the Spanish consular representative had been impaired and he subjected to personal indignity. The incident occurred at a time when the Spanish Government had just shown its regard for and goodwill toward

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§ 522. President Cleveland's special message.—President Cleveland, in a special message on March 2, 1886, transmitted to Congress the correspondence between the Secretary of State and the Chinese Minister, and asked that body, in its high discre-

the United States in pardoning certain American citizens who had participated in a hostile invasion of Cuba, and had incurred the condemnation of the authorities of that country. Recognizing the merciful action of the Queen of Spain in this regard, and as a responsive act of generosity and friendship tending toward good relationship, the President, while expressly denying the principle of national liability, recommended to Congress the appropriation of certain moneys to be paid to private individuals on account of the damages caused by riots at New Orleans and Key West, and to the Spanish consul at New Orleans a special indemnity as an official of Spain.

"In one thing, however, the Spanish riots of 1850 and the Rock Springs massacre of 1885 are similar. Both grew out of alien animosities transplanted to our shores. . . . . But this has no bearing on the question of the indemnity accorded to Spain, which was, as you indeed candidly admit in your note, 'a voluntary act of goodwill above and beyond the strict authorization of domestic law,' and, I may add, of international law also.

"A measure of international obligation rests on the United States under the third article of the treaty of 1880, which, in the event that Chinese laborers or others in the United States, 'meet with ill-treatment at the hands of other persons,' requires the Government of the United States to 'exert all its power' to devise measures for their protection and to secure to them the same 'rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.'

"That the power of the National Government is promptly and efficiently exercised whenever occasion unhappily arises therefor you have justly acknowledged, and it has been abundantly shown. The conditions under which this power may be applied are not always clear and are sometimes very difficult. Causes growing out of the peculiar characteristics and habits of the Chinese immigrants have induced them to segregate themselves from the rest of the residents and citizens of the United States, and to refuse to mingle with the mass of population as do the members of other nationalities. As a consequence race prejudice has been more excited against them, notably among aliens of other nationalities, who are more directly brought into competition with the Chinese in those ruder fields of merely manual toil wherein our skilled native labor finds it unprofitable to engage. . . . . Moreover, the Chinese laborers voluntarily carry this principle of isolation and segregation into remote regions where law and authority are well known to be feeblest, and where conflicts of labor and prejudices of race may be precipitated on the slightest pretext and carried without check to limits beyond those possible where the powers of law may be better organized.

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tion, to direct the bounty of the government "in aid of innocent and peaceful strangers whose maltreatment has brought discredit upon the country; with the distinct understanding that such ac-

"No measures can be devised to meet the problem which do not take this state of things into account, nor can they be effective if they do not contemplate the exercise of authority where it is competent to afford protection, for these measures have only for their object to secure to the Chinese the same rights as other foreigners of the most favored nation enjoy, not superior or special rights. For Chinese labor is not alone repugnant to the local communities; from many quarters of the land comes the same cry—the conflict of different alien laborers and the oppression of the weaker by the stronger. There can and should be no discrimination in applying punitive measures to all infractions of law. And so, too, with preventive measures. What will protect a Hungarian or Italian contract laborer in Pennsylvania or a Swedish 'non-union' man in Ohio is equally applicable to a Chinaman on the Pacific Coast. . . . .

"Reverting, however, to your appeal of November 30, which I understand to be a direct application to the sense of equity and justice of the United States for relief for the unfortunate victims of the carnage and excesses of the mob at Rock Springs, I am compelled to state most distinctly that I should fail in my duty as representing the well-founded principles upon which rests the relation of this Government to its citizens, as well as to those who are not its citizens and yet are permitted to come and go freely within its jurisdiction, did I not deny emphatically all liability to indemnify individuals, of whatever race or country, for loss growing out of violations of our public law; and declare with equal emphasis that just and ample opportunity is given to all who suffer wrong and seek reparation through the channels of justice as conducted by the judicial branch of our Government.

"Yet I am frank to say that the circumstances of the case now under consideration contain features which I am disposed to believe may induce the President to recommend to the Congress, not as under obligation of treaty or principle or international law, but solely from a sentiment of generosity and pity to an innocent and unfortunate body of men, subjects of a friendly power, who, being peaceably employed within our jurisdiction, were so shockingly outraged; that in view of the gross and shameful failure of the police authorities at Rock Springs, in Wyoming Territory, to keep the peace, or even to attempt to keep the peace, or to make proper efforts to uphold the law, or punish the criminals, or make compensation for the loss of property pillaged or destroyed, it may reasonably be a subject for the benevolent consideration of Congress whether, with the distinct understanding that no precedent is thereby created, or liability for want of proper enforcement of police jurisdiction in the Territories, they will not, *ex gratia* grant pecuniary relief to the sufferers in the case now before us to the extent of the value of the property of which they were so outrageously deprived, to the grave discredit of republican institutions." For. Rel. 1886, 158; H. Ex. Doc. 102, 49 Cong. 1 Sess.

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tion is no wise to be held as a precedent, is wholly gratuitous, and is resorted to in a spirit of pure generosity toward those who are otherwise helpless." Congress, without making in the act any question of liability, appropriated $147,748.47 to be paid to the Chinese government for the losses sustained, to be distributed among the sufferers and their legal representatives, in the discretion of the Chinese government.[52] The Chinese legation subsequently returned $480.75, which sum represented duplicated claims of losses.[53]

§ 523. **Views of Senator Edmunds.**—When this bill appropriating money for the relief of Chinese residents was before the Senate, the views expressed by Mr. Bayard as to the nonliability of the government for these outrages were not universally concurred in. The bill was passed in the Senate by a vote of 30 to 10, and Senator Edmunds, who voted with the majority, contended that between nations there can be negligence on the part of governments, and said: "One nation as between itself and another is not bound by the internal autonomy of that state, but it looks to the body of the nation to carry out its obligations, and if they have not the judicial means to do it, for one reason or another, the nation that is injured is not bound by the failure of the nation whose people committed the injury."[54]

§ 524. **Other allowances for injuries to Chinese residents.**—In addition to the losses suffered at Rock Springs, injuries and losses had been inflicted on Chinese residents in the territories of Washington, Montana, Alaska and the state of California, and by article V of the immigration treaty between the United States and China, which was signed at Washington, March 12, 1888, the sum of $276,619.75 was agreed to be paid to the Chinese Minister at Washington by the United States as full indemnity for the losses so inflicted. This treaty, however, was never ratified, but Congress provided by the act of October 19, 1888, for the payment of the sum mentioned in the treaty as full indemnity for all losses and injuries sustained by Chinese subjects within the United States, stat-

[52] Act of February 24, 1887, 24 Stats. 418; Message of President Cleveland, March 2, 1886, H. Ex. Doc. 102, 49 Cong. 1 Sess.

[53] For. Rel. 1887, 243, 244.

[54] Cong. Record, vol. 17, pt. 5, p. 5186.

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ing that it was done "out of humane consideration and without reference to the question of liability therefor."[55]

§ **525. Explanation of treaty.**—Mr. Bayard, in his report to the President in which he explained the terms of the treaty, stated that the liability of the government was not to be admitted, as the article of the treaty referred to recited, yet conceded that "it is competent for this Government, in humane consideration of those occurrences, so discreditable to the community, in which they have taken place, and outside of the punitive powers of the National Government, to make voluntary and generous provisions for those, who have been made the innocent victims of lawless violence within our borders, and to that end, following the dictates of humanity, and, it may be added, the example of the Chinese Government in sundry cases, where American citizens who were the subjects of mob violence in China, have been indemnified by the Government, the present treaty provides for the payment of a sum of money." He stated, also, that this payment would reflect beneficially upon the welfare of American residents in China, and in a measure would remove the reproach to our civilization caused by the crimes to which he referred.[56] Article V of the proposed treaty, which, as we have said, was not ratified by the Senate, declared that the money to be paid by the United States was "without reference to the question of liability therefor, which as a legal obligation it denies."[57]

§ **526. Mafia riots and lynching at New Orleans.**—The chief of police of New Orleans, D. C. Hennessy, was murdered, it was supposed, through the action of a secret Italian society known as the Mafia. On March 14, 1891, eleven Italians charged with his murder were killed by a mob, and the Italian consul reported the affair immediately to the Italian Minister at Washington. The latter was instructed by the Italian Minister of Foreign Affairs to request protection for the Italians in New Orleans and to demand the punishment of those concerned in the attack. The Italian Minister, in pursuance of these instructions, brought the

[55] 25 Stats. 565, 566; For. Rel. 1889, 116-118.

[56] For. Rel. 1888, I, 396-400; Id. 359-395; S. Ex. Doc. 272, 50 Cong. 1 Sess.; 25 U. S. Stats. 565, 566; For. Rel. 1889, 116-118; 6 Moore's Law Dig., sec. 1025.

[57] For. Rel. 1881, I, 396-400.

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affair to the attention of the Secretary of State, Mr. Blaine, who telegraphed to the governor of Louisiana that the treaty between the United States and Italy guaranteed to the subjects of the latter country constant protection and security for their persons and property, and that the President hoped the governor would co-operate with him in maintaining the obligations of the United States toward the Italian subjects in his state, to the end that further violence might be prevented.

§ 527. **Demands of the Italian government.**—The Italian government asked not only the official assurance by the United States that the guilty parties should be brought to trial, but also that it should be recognized in principle that an indemnity was due to the relatives of the victims. As our government refused to make any promise of reparation, Italy recalled its Minister. Considerable correspondence passed between the two governments and some misunderstanding arose as to the meaning of certain language used by our government as conveying an admission that an indemnity was due, and finally, to correct any impression to that effect, Mr. Blaine stated that the question whether there was or was not a violation of the treaty was a question upon which the President, with sufficient facts before him, had taken ample time for decision, and declared that the position taken by our government was that if it should appear that "among those killed by the mob at New Orleans there were some Italian subjects who were resident or domiciled in that city, agreeably to our treaty with Italy, and not in violation of our immigration laws and who were abiding in the peace of the United States and obeying the laws thereof and of the State of Louisiana, and that the public officers charged with the duty of protecting life and property in that city connived at the work of the mob, or, upon proper notice or information of the threatened danger, failed to take any steps for the preservation of the public peace and afterward to bring the guilty to trial, the President would, under such circumstances, feel that a case was established that should be submitted to the consideration of Congress, with a view to the relief of the families of the Italian subjects who had lost their lives by lawless violence."[58]

[58] For. Rel. 1891, 665-667, 671, 672, 674, 712.

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§ 528. **Withdrawal of American Minister.**—Mr. Porter, the American Minister, after the withdrawal of Baron Fava, the Italian Minister at Washington, withdrew from Rome and was granted leave to visit the United States. President Harrison, in his annual message of December 9, 1891, stated that it would be competent for Congress to make offenses against treaty rights cognizable in the federal courts, but that this had not been done, and that federal officers and courts have no power to intervene. It would seem to follow, he said, that the officers of the state should be regarded as federal agents, so as to make the government responsible for their acts in cases where it would be responsible, if it had used its constitutional power to define and punish crimes against treaty rights.[59]

§ 529. **Tender of indemnity.**—Mr. Blaine, in a note dated April 12, 1892, tendered to the Minister of Foreign Affairs of Italy 125,000 francs, or $24,330.90, stating that while the injury was not inflicted directly by the United States, still, in the opinion of the President, it was the solemn duty as well as the great pleasure of the national government to pay a satisfactory indemnity, and expressed the hope that all memory of the unhappy tragedy might be effaced. The Marquis Imperiali, Minister of Foreign Affairs, accepted the indemnity, but stated that he did so "without prejudice to the judicial steps which it may be proper for the parties to take," and that by the instructions of his government diplomatic relations between Italy and the United States were fully re-established.[60]

[59] For. Rel. 1891, V; For. Rel. 1892, XIV.

[60] For. Rel. 1891, 665, 671, 674, 712, 727, 728; For. Rel. 1891, V.; For. Rel. 1892, XIV; 6 Moore's Int. Law Dig., sec. 1026. The language of President Harrison in his message of December 9, 1891, on this subject was:

"The lynching at New Orleans in March last of eleven men of Italian nativity by a mob of citizens was a most deplorable and discreditable incident. It did not, however, have its origin in any general animosity to the Italian people, nor in any disrespect to the Government of Italy, with which our relations were of the most friendly character. The fury of the mob was directed against these men as the supposed participants or accessories in the murder of a city officer. I do not allude to this as mitigating in any degree this offense against law and humanity, but only as affecting the international questions which grew out of it. It was at once represented by the Italian minister that several of those whose lives had been taken by the mob were

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§ 530. **Suits to recover damages.**—Suits were brought to recover damages by the relatives of those killed in the riot, but it was decided that the killing of a human being by a mob allowed to congregate by the negligence of municipal officers does not render the municipal corporation liable for damages in the absence of a statute so declaring. The treaty between the United States and Italy, then in force, guaranteed to the citizens of either nation in the territory "the most constant protection and security for their persons and property," and also that "they shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed upon the natives."[61] The court decided that this treaty was applicable only so far as to require that the rights of the Italian mother, who was suing for the death of her son, should be adjudicated and determined exactly the same as if she were, and her deceased son had been, a native citi-

Italian subjects, and a demand was made for the punishment of the participants and for an indemnity to the families of those who were killed. It is to be regretted that the manner in which these claims were presented was not such as to promote a calm discussion of the questions involved; but this may well be attributed to the excitement and indignation which the crime naturally evoked. The views of this Government as to its obligations to foreigners domiciled here were fully stated in the correspondence, as well as its purpose to make an investigation of the affair with a view to determine whether there were present any circumstances that could, under such rules of duty as we had indicated, create an obligation upon the United States. The temporary absence of a minister plenipotentiary of Italy at this Capital has retarded the further correspondence, but it is not doubted that a friendly conclusion is attainable.

"Some suggestions growing out of this unhappy incident are worthy the attention of Congress. It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal Courts. This has not, however, been done, and the Federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen, or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as Federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights."

[61] Treaty of 1871, art. 3; 17 Stats. at Large, 845.

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zen of this country.[62] The statute of Louisiana makes a municipal corporation liable for the destruction of property by mobs, but this does not render a city liable for the killing of a person by a mob. The protection of life by a municipal corporation is a public duty required of the government, and, in the absence of statute, a city is not liable for failure in its performance.[63]

§ 531. Killing of Italian subjects in Colorado in 1895.—Congress again, on another occasion, by an act approved June 30, 1896, out of humane consideration and without reference to the question of liability therefor, made an appropriation to the Italian government of $10,000 for full indemnity to the heirs of three of its subjects who were riotously killed and two others who were injured in the state of Colorado by residents of that state. A coroner's jury found that A. J. Hixon, an American saloon-keeper, whose corpse was found in the coal-field of Rouse, Colorado, had been murdered by an Italian miner named Andinino. He was apprehended and lodged in jail at Walsenburg, situated seven miles from the scene of the murder, and other Italian miners who were implicated by the inquest were also arrested, and four of them, named respectively, Vittone, Ronchietto, Giacobini, and Gobetto, were, under the escort of two deputy sheriffs, being taken to Walsenburg, when they were intercepted by half a dozen men on horseback and in the encounter Vittone was instantly killed. Giacobini and Gobetto escaped, and Ronchietto escaped with a wound but was shortly after recaptured and placed in the same cell with Andinino. On the evening following, seven masked and armed men entered the jail, killed Andinino and Ronchietto, thus making three in all who were killed. The other two prisoners, Giacobini and Gobetto, who had escaped, were subsequently found wandering in the mountains with their feet frost-bitten to such a degree that it became necessary to amputate them. Ronchietto and Vittone had declared their intention to become citizens of the United States, but had not been naturalized, and Andinino had, so far as the evidence showed,

[62] New Orleans v. Abagnatto, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329.

[63] Gianfortone v. New Orleans, 61 Fed. 63, 24 L. R. A. 592. In the L. R. A. just cited there is an elaborate note on the subject of liability of a municipal corporation for property destroyed by a mob.

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taken no steps to throw off his Italian allegiance. A German who was in the same cell when the attack was made on the prisoners at the jail was unmolested.

§ 532. **Variance between consul and ambassador.**—The Italian consul at Denver reported that he enjoyed the co-operation of the authorities, from the governor down, in his efforts to secure the prosecution of the offenders, but that delays and difficulties had occurred in the institution of proceedings, owing to various causes, among which were the sparseness of the population and the infrequency of terms of court. The Italian ambassador, however, in his representations to the Department of State, asserted that neither in the attack on the road nor in the breaking into the jail was any resistance made by the public force, which fact, he claimed, fixed the responsibility on the local authorities.[64]

§ 533. **Action of the United States.**—The Secretary of State suggested to the Italian ambassador that he formulate a claim, which he did, leaving it to "your high and benevolent appreciation to suggest the amount which may be deemed suitable to indemnify the families of the victims of the Colorado mob, according to the spirit of justice which prompts all your actions." Mr. Olney, Secretary of State, in reporting the claim to the President, with a view to its submission to Congress, stated that the facts were without dispute, and no comment or argument could add to the force of their appeal to the generous consideration of Congress, and he declared: "The only question would seem to be as to the amount of the gratuity in each case, which must rest, of course, wholly in the discretion of Congress, to whom it can hardly be necessary to cite the statutes of many states of the Union fixing the maximum to be exacted in the case of death caused by negligence at the sum of $5,000."[65]

President Cleveland, in a message to Congress of February 3, 1896, communicated Mr. Olney's report, and after stating the facts added: "Without discussing the question of the liability of the United States for these results, either by reason of treaty obligations or under the general rules of international law, I venture to urge upon the Congress the propriety of making from the pub-

[64] For. Rel. 1895, II, 950.

[65] For. Rel. 1895, II. 938.

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lic treasury prompt and reasonable pecuniary provision for those injured and for the families of those who were killed."[66]

§ 534. **Lynching of Italians at Hahnville.**—On August 8, 1896, three Italians, Salvatore Arena, Lorenzo Salardino, and Guiseppe Venturella, who were held on a charge of homicide, were lynched in the jail at Hahnville, Louisiana, while they were still in the custody of the legal authorities. When they were first imprisoned the sheriff, on account of the prevailing excitement, placed an extra guard around the jail, but subsequently, in the belief that the excitement had subsided, removed the extra guard, and, according to his usual custom, left the jail in charge of the jailer. An armed mob, composed of unknown persons, broke into the jail and lynched the prisoners, but did not molest three other Italians who were confined in the same prison.

In this case, Secretary Olney, in his correspondence with the Italian Minister, asserted that the lawless act was directed against the victims as criminals, and not because of racial prejudice, as was shown by the fact that three other Italians, confined in the same jail, were not harmed, and also that the three lynched men, by taking part in the political affairs of this country and voting at elections, must be regarded as having renounced their legal status. Salardino had lived for twelve years in Louisiana and had participated in the civil affairs of the state, by voting at elections, and that Venturella and Arena had also resided in Louisiana for several years and had voted at elections, Arena having declared his intention to become a citizen of the United States. The crime, Mr. Olney said, of which they were accused was peculiarly atrocious, the attack on the jail unexpected, and its success was not imputable to any negligence or connivance on the part of the authorities, and that there was no reason to suppose that the result would have been different had the victims been citizens of the United States. He laid particular emphasis upon the point that they were not "Italians temporarily residing in the United States," and that although a declaration of intention had been found only in the case of one, it had doubtless been made by the others, for the reason that they could not have voted otherwise, and that by their qualifying and acting as electors they, in ac-

[66] H. Doc. 195, 54 Cong. 1 Sess.; For. Rel. 1895, II, 938.

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cordance with the Constitution and laws of Louisiana, had become citizens of that State and eligible to office. Our government, under these circumstances, while reserving, for the moment, its decision, suggested to the Italian government whether as against the United States it had "any right or duty of reclamation."[67]

§ 535. Government citizen's agent.—Mr. Olney, Secretary of State, declared that in securing indemnity for injuries inflicted upon a citizen, the government that presents the claim is, in truth, the citizen's agent. Any legal or equitable defense, he contended, that is good as against the citizen himself is equally good as against his representative. An individual, in his view, who participates in making the laws and electing the officers of one government must be held to estop himself from complaining of that government to any other; and, he maintained, he is not distinguishable, in point of principle, but is to be identified with the body politic of which he is a member. "He may not approve of a particular act of that body," said Mr. Olney, "but he contributes to the power which enables it to do any or all acts. As a matter of fact, indeed, his vote may have brought about the very legislation or elected the very officer responsible for the injury of which he complains.

"The soundness of the position, therefore, that an international reclamation will not lie against a Government when the beneficiary of the claim by taking part in the organization and administration of that Government has in effect given his assent to its proceedings, seems to be supported by every consideration of justice and equity. These considerations, which go to the duty of the Italian Government in the premises, are re-enforced by the absence of any real interest on its part. The wrongs done at Hahnville, on account of which its intercession is asked, were to persons who had abandoned Italian soil and had ceased to be part of the population of the kingdom, and who added nothing to its productive capacity or to its military strength. To intercede as asked, therefore, is to use the credit and prestige and power of the Italian Government on behalf of persons, or the representatives of persons, whose fate and fortunes were at the time of the

[67] For. Rel. 1896, 407, 410, 411. Mr. Olney, Secretary of State, to Baron Fava, Italian Ambassador.

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infliction of the wrongs complained of no real concern to that Government."[68]

§ 536. Contention of Italian ambassador.—Baron Fava, the Italian ambassador, in response, contended that the question at issue was the application of the fundamental principle of law and justice, that the persons accused were to be deemed innocent un-

[68] For. Rel. 1896, 407, 410, 411. He then proceeded to point out the distinction between this and other cases, and said: "In bringing the Hahnville cases to the notice of the State Department your excellency has evidently been under the impression that they resemble in all substantial particulars the cases of certain Italians lynched in New Orleans in 1891, and of certain others lynched in Walsenburg, Colo., in 1894. But in the last-named cases there was neither allegation nor proof that the persons killed had ever taken part in the political affairs of a State or of the United States by qualifying as voters and actually voting at elections. In the New Orleans cases, out of the eleven persons of Italian extraction who were lynched, two were American citizens; five had declared their intent to become United States citizens and had voted; of the remaining four, three had neither voted nor declared their intent to become United States citizens, while one had declared such intent, but had not voted. To the four persons last mentioned the representations of your Government and its demands upon the United States through you were expressly limited, as appears by reference to the correspondence on the subject between yourself and the State Department. It is true that the Italian consul at New Orleans, in a note to the district attorney, argued that the Italian Government could rightfully intervene on behalf of the five persons who had declared their intent to become United States citizens and had voted, and that the district attorney in a note to the Attorney General controverted that view. But no position of the Italian consul, though brought to your notice, was ever adopted by you—it was never discussed between the two Governments. The note announcing your departure from Washington by order of your Government specifies only four Italian subjects on account of whom demands had been made upon this Government, and the incident, when settled, was settled by the payment of a lump sum, the application of which was left wholly to the Italian Government. The result is that the subject to which the attention of the Italian Government is now invited is one upon which the two Governments in their relations to each other stand wholly uncommitted. It is not, therefore, permissible to doubt that the question will be examined and passed upon by each in an enlightened spirit and with a sincere purpose not only to dispose of the particular matter in hand, but to ascertain and fix a just and proper rule for the determination of all like questions hereafter arising." For. Rel. 1896, 407, 410, 411.

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til found guilty by judicial process, and that what the position and responsibility of the persons murdered, or the apparent criminality of the persons lynched might have been, was unimportant. The evidence showed, he maintained, negligence on the part of the local authorities in failing to protect the prisoners, and to apprehend and prosecute the lynchers, and that such proceedings as had been taken could not but tend to encourage similar outrages in the future. He called attention to the fact that naturalization could be granted by the federal laws exclusively, and not by the State laws, and that mere declaration of intention did not confer citizenship.[69] He declared that no matter what the laws of Louisiana might be, and although they might have voted as electors, they were not citizens of the United States, because they had not complied with the provisions of the Revised Statutes regulating naturalization. He called attention to certain cases in which it was held that the power of naturalization was exclusively in Congress,[70] and also to the opinion of counsel upon the status of electors who were not citizens, in which it was stated: "The alien elector has certain privileges in the matter of voting in Louisiana, and in a few other states, granted to him in anticipation of a future naturalization which may never ripen into citizenship, and that is all. But he has not yet crossed the Rubicon. He has not been naturalized under the act of Congress. He is still under the allegiance of the foreign government, and competent to place himself under the aegis of its protection." He argued that this was sufficient to show that as the Italians had not complied with the requirements of the provisions on the subject of naturalization contained in the Revised Statutes, they still maintained their capacity as Italian subjects.[71]

[69] For. Rel. 1896, 412, 414, 418, 421, 422.

[70] Citing Chirac v. Chirac, 2 Wheat. 269, 4 L. ed. 234.

[71] For. Rel. 1896, 412, 414. He said that without prejudice to the incontestable Italian nationality of the Italians, he did not hesitate to enter upon an examination of the other points relative to their status, and proceeded: "It is stated by the special agent of your Department that Salardino, Arena and Ventureila had voted at the political elections in Louisiana; that Arena had taken out his first naturalization papers, while it is to be presumed that the two others had done the same, as they also had presented themselves at the elections; and that all three had definitely fixed their domicile in the United States.

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§ **537. Italians voting.**—Baron Fava said that the entire solution of the difficulty was found in the treaty in force between the United States and Italy. He again presented the request "that the guilty parties be sought and brought to justice; that steps be

"I do not know what were the sources of this information; as, however, they are wholly at variance with that furnished the authorities of Louisiana, and with that which I have received from the Italian consulate at New Orleans, I must beg your excellency to inform me: (a) In what registers and under what date the three Italians are inscribed as electors; (b) from which of the five Federal courts of Louisiana Arena had received his first papers; (c) when, and to whom, the three Italians had declared that they had fixed their domicile in the United States. . . . .

"But even if Salardino, Arena and Venturella had voted at the elections, and even if the laws of Louisiana attached great importance to that fact, how could this affect the well-proved fact that they were not American citizens?

"The first, Salardino, had resided fully twelve years in Louisiana, and even if he voted, he had not taken out either his first or second naturalization papers. Arena, according to the special agent, had only taken out his first papers, and his attempts to become an American citizen had stopped there. Venturella does not appear to have done even this, as the said special agent could not find either his certificate of first declaration or that of Salardino. All three had had time to ask for their first and second papers. Why did they not do so? The mere fact of having voted would not have conferred upon any of the three the right of citizenship, as is amply shown in the inclosed memorandum; and if they voted, they voted illegally, and probably because they had been misled by native politicians in search of voters, legal or illegal.

"But there is more to be said. The four Italians who were lynched at Walsenburg on the 14th of March, 1895, Francesco Ronchietto, Stanislao Vittone, Pietro Giacobino and Antonia Gobette, had solemnly declared their intention to become citizens of the United States, and to renounce forever all submission and allegiance to any foreign prince, potentate, state or sovereignty, and especially the King of Italy, and they all were in possession of their first naturalization papers. Notwithstanding this, and in spite of those solemn declarations, when I informed the Federal Government of the murders which had been committed, Mr. Uhl came to my house and expressed the President's regret for that bloody act, and your honorable predecessor and your excellency yourself, deeply impressed with a sense of the duties which the Government of the Union has assumed toward a friendly power by virtue of treaties, did not raise the slightest objection; you all immediately recognized the Italian nationality of the four victims, and a suitable indemnity, recommended by your Department and by the President, was granted to the bereaved families. In view of this precedent, it can hardly be maintained that the subject to which you have now

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taken to prevent the repetition of such atrocious crimes, and that at the same time, just and adequate compensation be made to the families of the victims." In a subsequent letter, he said relative to the suggestion whether the Italian government can or cannot

called my attention is one of those as to which the two Governments are entirely uncommitted.

"And lastly, the fact that the three victims had been in the United States for several years cannot be cited as a proof of their deliberate '*animus manendi.*' If they had not been residing here temporarily, as asserted by your note, they would have sent for their families, whom they had left in Italy, where they had their domicile, and whom they supported from here by their labor, Venturella his wife and seven children, Arena his wife and four-year-old son, and Salardino his old father, who was unable to earn his living. Under these circumstances, and however long and continuous their absence from Italy might have been, it cannot be said that they had transferred their domicile to Louisiana, nor had they no intention of returning to their native land, nor that they were not contributing to the resources and wealth of their own country. They had come here on business; that is to say, to provide by the fruits of their labor for the comfort of their wives, children, and parents, and they were thus contributing to the wealth of the country in which they had their home.

"Nor is the other assertion, that they had withdrawn from military service, correct. By the two affidavits which I have the honor to submit to you (inclosures 5 and 6) the signers declare under oath:

"(a) That Guiseppe Venturella had performed his regular military service in the artillery, and that he landed in the United States with a regular passport in his possession.

"(b) That Salvatore Arena had not performed any military service, because, as an only son, he was enrolled in the third class, and that when he arrived in the United States, he was in possession of a regular passport.

"(c) And lastly, that Lorenzo Salardino had never performed any military service, because he, too, as an only son, was enrolled in the third class, and that he came to the United States with a regular Italian passport.

"I cannot follow your excellency in the views expressed by you as to a Government demanding indemnity for injuries inflicted upon one of its own subjects, being the agent of said injured subject. In that case the American Government would be, near that of the Sultan, the agent of the missionaries, in behalf of whom it is now demanding indemnities. Every Government owes it to itself to protect, within the bounds of justice, its own subjects, however poor and humble, and it would otherwise lose the respect of civilized nations.

"Referring to the other lynching which occurred in New Orleans in 1891, and which you mention in your note, I must correct a statement contained in that note, which statement is absolutely and entirely incorrect. Of the eleven persons who were victims of that savage slaughter, two were American citizens, four were

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consider as its subjects those Italians to whom it is permitted to vote in the states of the Union: "Allow me to observe that the solution of this question belongs solely to the Italian legislator and to Italian law. As a matter of fact I can add that the Federal Government has always considered and still considers as citi-

undoubtedly Italian subjects, and the other five, who had only taken out their first papers, were justly regarded by the royal consul at New Orleans as Italian subjects. By the pure, simple, and unreserved transmission to the Department of State, in my note of March 25, of the report of the said consul, I evidently and impliedly adopted his views on the subject. Otherwise I would have kept his report to myself. In consequence of its having been remarked to me in person at the Department of State that it was possible that those five persons had also taken out their last papers, I requested the consul to make new and closer investigations in the case. As the diplomatic rupture between the two countries occurred a few days afterwards, and as the consul's replies did not reach me in time, I mentioned in my note of March 31 only the four Italians who were undoubtedly subjects of the King. But still I never had a thought of abandoning the other five if it should be found that they had only their first papers. In fixing the indemnity at $25,000 the United States Government must, therefore, certainly have admitted that those five persons were Italian subjects, in spite of the fact that they had procured their first naturalization papers.

"I think that I have shown by the foregoing remarks that the particular points in your excellency's note, which I have examined with all sincerity of purpose, are insufficient to induce my Government to desist from taking that just action which is called for by the murder of the Italian subjects at Hahnville; nor can they in any way disprove the incontrovertible fact of the Italian nationality of Arena, Venturella, and Salardino. Besides, this fact was immediately admitted by the judicial authorities of Louisiana themselves, in their report of August 15, and, on the ground of that report, by the Department of State in the telegram sent by it to the governor on the 29th of August. Like the said five persons who were lynched at New Orleans in 1891; like those of 1895 at Walsenburg, Arena, Venturella, and Salardino were Italian subjects. And it was precisely owing to this undoubted personal status of theirs that I had to insist in our interviews—and the high officials who took your place temporarily last summer likewise adhered to them—that 'in dealing with the present case the New Orleans lynching of 1890 and the Colorado murders of 1895 should serve as precedents.'

"In view of the proven Italian nationality of the three subjects of the King who were lynched at Hahnville, I do not see, in conclusion, any other way of arriving at a legal, just, and final settlement of the dispute than that indicated by the treaties, the only one consistent with the dignity of great nations." For. Rel. 1896, 412, 414.

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zens of the United States, the numerous Americans who in Hawaii take a prominent part in the political affairs, and vote openly at the elections of these islands."[72]

§ 538. **Subject closed by appropriation.**—Mr. Olney, in his report to the President, December 7, 1896, stated that investigation had shown that the three men lynched had participated in the political affairs of this country, and that their cases were thus different from the prior cases at New Orleans and Walsenburg, in which indemnity was tendered to the relatives of such of the victims as remained loyal subjects to Italy.[73] He said: "Upon the assumption that the unfortunate men were, as in the case of some of the victims of the preceding lynchings, Italian subjects, the Government of Italy sought the mediation of that of the United States with the State authorities to the end of investigating the occurrence, and if the facts so warranted, making provision for the families of the sufferers as in the former instances. The State of Louisiana promptly instituted an inquiry, expressing regret and a purpose to seek out the offenders. An independent investigation, set on foot by the Department of State and conducted by a trusted agent, has just been concluded. As its result, it appears that all the normal precautions for the safety of the prisoners had been taken by the local officers, and that no blame can justly attach to them by reason of the sudden outbreak of mob violence against these three men against whom there lay convincing evidence of the murder of two estimable citizens of the neighborhood. That the lawless act was directed against the victims as criminals, and not because of racial prejudice, is shown by the circumstances that three other Italians confined in the same jail on lesser charges were unharmed."

§ 539. **Renunciation of Italian allegiance.**—He stated that one of the most important results of the investigation in its bearings upon the possible international features of the controversy was the fact that the victims of the mob, by taking part in the political affairs of the country, and by voting at elections, must probably be considered as having abandoned their original status. "It is established," said he, "by the appropriate record evidence

[72] For. Rel. 1896, 414-418, 421, 422. [73] For. Rel. 1896, LXXVI.

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that one had also taken the preliminary steps to abjure Italian allegiance, while the others must be presumed to have done so, since by domicile and sharing in the electoral franchise they had acquired lawful citizenship of the State of Louisiana, a privilege inuring only to such as could show their declaration of intention to be naturalized. Their cases being thus differentiated from the prior instances at New Orleans and Walsenburg, when indemnity was offered to the relatives of such of the lynched men as were found to have remained faithful subjects of Italy, the precedent then set is only applicable now so far as it eliminates all claim by Italy on behalf of those men who were ascertained to have exercised the civil rights of aliens lawfully admitted to citizenship in this country.

"Whether or not any obligation rests upon the Federal Government under the circumstances—a matter as respects which the Government has thus far reserved its decision—the existence or the absence of such obligation cannot diminish the feelings of abhorrence with which all good citizens must view such brutal acts of blind vindictiveness in defiance of the justice of a Commonwealth and in disparagement of its good name."

The subject was closed by an appropriation by Congress in the deficiency act of July 9, 1897, of $6,000, which was stated to have been made "out of humane consideration and without reference to the question of liability therefor, to the Italian Government, as full indemnity to the heirs of three of its subjects, Salvatore Arena, Guiseppe Venturella and Lorenzo Salardino, who were taken from jail and lynched in Louisiana in 1896."[74]

§ **540. Other lynching of Italians.**—The Italian government in another case felt called upon to characterize as "a denial of justice, a flagrant violation of contractual conventions, and a grave offense to every human and civil sentiment," the lynching of cer-

[74] 30 Stats. 106. The same act contained an appropriation "To pay, out of humane consideration, without reference to the question of liability therefor, to the German Government, as full indemnity to Christopher Schmidt, a German subject, for injuries received on the fourteenth day of July, eighteen hundred and ninety-two, on the public highway near the rifle range of Fort Snelling, by a shot fired by one of a party of United States soldiers engaged in target practice, three thousand dollars."

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tain Italians at Erwin, Mississippi, and the failure of the local authorities to prosecute and punish the perpetrators. The crime was committed under the cover of darkness, and neither the coroner's inquest nor the investigation by the grand jury was able to discover their identity. The Italian embassy, in their protest, alluded to failure of Congress to confer jurisdiction in such cases on the federal courts, as recommended by the President, and stated that until such power was conferred, the Italian government would have reason to complain of violation of the treaties to its injury, and would not cease from denouncing "the systematic impunity enjoyed by crime and to hold the federal government responsible therefor." The Department of State transmitted the protest to the Committees of the Senate and House of Representatives, which had under consideration the recommendation of the President that indemnity should be tendered to the families of the victims and that legislation should be enacted conferring upon the federal courts original jurisdiction of offenses against aliens.[75] The sum of $5,000 was appropriated by Congress using the usual formula, "out of humane consideration, without reference to the question of liability therefor to the Italian Government."[76]

The lynching on July 21, 1899, of five persons of Italian origin by a mob at Tallulah, Louisiana, became the subject of correspondence with the Italian government, and induced President McKinley to urge Congress to confer upon the federal courts jurisdiction in this class of international cases.[77]

§ 541. Wounding of a British subject at New Orleans.—The British ambassador, in presenting a claim for compensation to a British subject injured at New Orleans in 1895, expressed the hope that the government of the United States would take such action as might be necessary to obtain from Congress or otherwise the relief to which he was so justly entitled. The person injured was a purser on a British steamship, and while he was discharging his duties on the wharves he was, without provocation or admonition, shot by a body of armed men. The rioters did not intend to shoot him, but he was injured in a volley fired at laborers, whom

[75] For. Rel. 1901, 283, 285, 287, 289, 292, 293, 297-299; 6 Moore's Inst. Law. Dig. 849.

[76] 33 Stats. 1032.

[77] For. Rel. 1899, 440, 441, 444, 447, 448, 453-459, 463.

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the rioters attempted to prevent from working on the levee. After the shooting, the local authorities of Louisiana arrested and indicted six men for an assault with intent to commit murder, but as the purser had returned to England and was not present when the cases were called for trial, it was stated by the prosecuting officer that they could not be tried in his absence.

The Ambassador referred to the article of the treaty of commerce of 1815 declaring that "the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce." He stated that certain societies had for some months prior to the shooting attempted forcibly to prevent the employment of colored laborers in loading and unloading of ships, and that in consequence of their lawless proceedings foreign ships and property were exposed to great danger. The foreign consuls of the port had appealed for protection to foreign shipping, but none was afforded. At the time the shooting was in progress the few policemen in the vicinity concealed themselves for safety behind cotton bales, and the police, it was alleged, had allowed the rioters to assemble in a building in which they maintained an arsenal of rifles, revolvers and other deadly weapons.

§ **542. Appropriation by Congress.**—The governor of Louisiana, to whom a copy of the correspondence had been communicated, returned, in reply, a report of the attorney general of the state. The latter denied that there was any failure on the part of the state authorities to protect the commerce of the city, and stated that the governor had called out the militia and had given full and ample protection to the commerce of the city as soon as practicable after the threatening situation was called to his attention. He stated, further, that the rioting happened early in the morning before the arrival of the governor, and that no blame attached to him nor to any other state authority. Finally, Congress by the deficiency act of June 8, 1896, appropriated $1,000 to the British government as full indemnity, making the usual reservation that it was done out of humane consideration, and without reference to the question of liability.[78]

[78] For. Rel. 1895, I, 686, 689, 690, 691, 694, 696; For. Rel. 1896, 300; 6 Moore's Int. Law Dig. 850.

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§ **543. Hanging of a Mexican in California.**—A Mexican, named Moreno, and another individual were arrested and lodged in jail at Yreka, California, charged with having shot two persons, one fatally. Both were identified by one of the wounded men, and the two persons arrested, and two others, all of whom were accused of murder, were taken by a mob from the jail to the court-house park, and hanged. A demand was made by the Mexican Minister for the punishment of the persons engaged in the lynching and for the payment of a suitable indemnity to the family of Moreno. The governor of California, at the request of the Department of State, investigated the affair and reported that he took steps shortly after the lynching to secure the punishment of the guilty parties, but that no clue to the identity of the persons concerned had been discovered, and that, consequently, the grand jury had failed to find an indictment, and in a subsequent report he declared that he did not consider it within the limits of possibility that any person concerned in the affair would ever divulge it. The Mexican government, on receiving copies of these reports, renewed its request for indemnity, and Mr. Sherman, Secretary of State, in his report to the President on January 14, 1898, recommended that the same course be pursued in the case of Moreno as was taken in the case of the lynching of Italian subjects at Hahnville, Louisiana, "and that Congress be requested, without question of the liability of the United States, to appropriate the sum of $2,000 as full indemnity to his heirs." This recommendation was carried into effect by the act of July 7, 1898, appropriating $2,000 to be paid "out of humane consideration, without reference to the question of liability therefor, to the Mexican government, as full indemnity to the heirs of Luis Moreno, who was lynched in 1895 at Yreka, California."[79] A similar lynching occurred in Lasalle county, Texas, of a Mexican citizen named Florentino Suaste, and on March 3, 1901, Congress appropriated a similar amount on similar terms to be paid to the Mexican government as indemnity to his heirs.[80]

§ **544. Responsibility of government for boycott.**—The government cannot recognize any obligation on its part to indemnify foreign residents against whom a boycott is conducted. They

[79] 30 Stats. 653; H. Doc. 237, 55 Cong. 2 Sess.

[80] 31 Stats. 1010.

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have recourse to the courts, where they can obtain the full relief to which they, in law, are entitled.

Claims on behalf of several hundred Chinese subjects who were residing in Butte, Montana, were presented by a note of July 6, 1901, through the Chinese Minister at Washington, who alleged that the Chinese claimants had sustained damages in the sum of $500,000 for injuries suffered by a boycott against them by various labor organizations of that city. An injunction had been issued by the federal court restraining the defendants from the acts complained of, but the claimants insisted that the conspirators were insolvent, and were still attempting to accomplish their design by clandestine means, and that no remedy could be obtained by instituting proceedings against the local authorities.

Mr. Hay, Secretary of State, in his letter of December 4, 1901, to Mr. Wu, Chinese Minister, declared that the ordinary rule is that diplomatic intervention is improper in any case where ample judicial remedies exist, and that the damages suffered could have been avoided by a prompt appeal to the court, and that the failure and neglect of the Chinese subjects to avail themselves of their remedial rights could not make the United States culpable and responsible for the resulting damages. "The statement that the conspirators," said Mr. Hay, "are still seeking to execute their conspiracy by clandestine means is one which, to justify action, should be sustained by proofs, on the submission of which to the court it is not doubted that the penalties for disobeying the injunction will be applied.

"The statement that no remedy could be found against the unlawful action of the city or county authorities in aid of the conspirators, the Department is unable to accept as correct in point of law.

"The Department is glad to be able to assure you that while the action of the Federal court is sufficient proof that the rights of the subjects of the Empire of China domiciled in the city of Butte will be protected and enforced by the judiciary, it may yet add that the Executive will not fail, should the case arise justifying its interposition, to use all its power to secure to them all the rights, privileges, immunities, and exemptions guaranteed by the United States Constitution and by treaty between the Government of the United States and China." [81]

[81] For. Rel. 1901, 127.

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Again, Mr. Sherman, Secretary of State, on March 31, 1897, replying to a complaint of Mr. Hoshi, Japanese Minister, of the failure of the local authorities to prevent the enforcement of a boycott against Japanese subjects at Butte, Montana, stated that the attorney general of the United States had advised that no federal statute existed which made the boycott a criminal offense against the United States, and that the persons injured must seek redress by suit.[82]

§ 545. Responsibility of municipal corporation for damages by mobs.—It is not strictly within our object to discuss the responsibility of municipal corporations for injuries inflicted on persons and property by mob violence. The obligation of a city to respond in damages for injuries arising from this cause does not depend upon treaty obligations, but inasmuch as such violence is often directed against foreign residents, a brief statement of some of the principles that govern will be given. In the first place it may be observed that a municipal corporation is not responsible at common law for damages occasioned by mobs.[83] "The right to reimbursement for damages caused by a mob or riotous assemblage of people," says Mr. Chief Justice Field, "is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure. Municipal corporations are instrumentalities of the state for the convenient administration of government within their limits. They are invested with authority to establish a police to guard against disturbance, and it is their duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has, therefore, been generally considered as a just burden cast upon them to require them to make good any loss sustained from the acts of such assemblages which they should

[82] For. Rel. 1897, 368.

[83] Louisiana v. Mayor etc. of New Orleans, 109 U. S. 285, 3 Sup. Ct. Rep. 211, 27 L. ed. 936; New Orleans v. Abbagnato, 62 Fed. 240, 10 C. C. A. 361, 23 U. S. App. 533; Hart v. Bridgeport, 13 Blatchf. (U. S.) 289, Fed. Cas. No. 6149; Baltimore v. Pouetney, 25 Md. 107; Prather v. Lexington, 13 B. Mon. (Ky.) 559, 56 Am. Dec. 585; Ward v. Louisville, 16 B. Mon. (Ky.) 184; Chicago League Ball Club v. Chicago, 77 Ill. App. 124; Western College of Homeopathic Medicine v. Cleveland, 12 Ohio St. 375; Robinson v. Greenville, 42 Ohio St. 629, 51 Am. Rep. 857.

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have repressed. The imposition has been supposed to create, in the holders of property liable to taxation within their limits, an interest to discourage and prevent any movements tending to such violent proceedings. But however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject like all other measures of policy to any change the legislature may see fit to make, either in the extent of the liability or in the means of its enforcement."[84]

§ 546. **Liability imposed by statute.**—But in many states statutes have been passed placing a liability upon municipal corporations for injuries caused by mob violence. The liability, of course, will then depend upon the language of the statute. If the statute provides that the party injured shall not recover if it appears that the damage "was occasioned or in any manner aided, sanctioned or permitted by" his carelessness or negligence, or unless he "shall have used all reasonable diligence to prevent such damage, and shall have used all reasonable diligence to notify" the mayor or sheriff "of any threat or attempt to commit such injury to his property by any mob, and of the facts brought to his knowledge," he is not entitled to recover from a municipal corporation for the property destroyed, unless, if he had knowledge of the pending danger, he used reasonable diligence to notify the proper officer of the apprehended danger to his property. Nor can he recover damages under such a statute if he instigated or participated in the riot.[85] The liability, however, must be clearly imposed by statute, and will not arise from a provision of the charter declaring it to be the duty of a city to preserve the peace and to prevent disturbances and disorderly assemblages.[86]

[84] Louisiana v. Mayor etc. of New Orleans, supra.

[85] Wing Chung v. Los Angeles, 47 Cal. 531. See, also, Bank of California v. Shaber, 55 Cal. 322.

[86] Western College of Homeopathic Medicine v. Cleveland, 12 Ohio St. 375. See, also, Allegheny County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670; Matter of Pennsylvania Hall, 5 Pa. 204; Jolly v. Hawesville, 89 Ky. 279, 12 S. W. 313; Chicago v. Manhattan Cement Co., 178 Ill. 372, 69 Am. St. Rep. 321, 53 N. E. 68, 45 L. R. A. 848; Chicago League Ball Club v. Chicago, 77 Ill. App. 124; Fauvia v. New Orleans, 20 La. Ann. 410; Folsom v. New Orleans, 28 La. Ann. 936; Chadbourne v. Newcastle, 48 N. H. 196; Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605; Luke v. Brooklyn, 43 Barb. (N. Y.) 54; Granfortone v. New Orleans, 61 Fed. 64, 24 L. R. A 592; Pennsylvania Co. v. Chicago, 81 Fed. 317.

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§ **547. Reputation of deceased.**—The statute of Kansas provides that in actions against a municipal corporation for damages caused by a mob "the character, use or manner of occupancy of the property lost or destroyed, and the reputation of the person injured may be given in evidence in mitigation of damages."[87] Under such a statute the evidence need not be limited to the general reputation of the deceased, but it is proper to show any misconduct or crime committed within a reasonable time prior to the killing, which may have had an influence on the mob, or which would affect the value of his life to his next of kin.[88] "In the absence of the statute," said the court, "a civil action to recover from the city for the death of a person injured or killed could not be maintained, and those who claim under it must take the right subject to the limitations upon recovery expressed in the statute. Recognizing that a liability was being placed upon innocent citizens of the municipality as well as upon those who were guilty of wrongdoing, the legislature provided that the damages might be diminished by showing the character and use of the property lost or destroyed, and also the reputation and conduct of the person injured. Under the statute the bad reputation or misconduct of the person killed, which may have influenced the action of the mob, or which would affect the value of his life to the father, was a proper consideration for the jury. If the property destroyed by a mob is used as a hiding place for criminals or a shelter for vice, the facts may be shown in mitigation of damages; and if the life of the person has been given up to vice and crime, that, too, may be considered in determining the extent of the city's liability."[89]

§ **548. Participation by owner.**—An owner of property is not required to provide a police force for the protection of his property, as this is a duty which is incumbent upon the city authorities. He cannot be charged with negligence for employing foreigners who do not speak English, nor can the fact that his employees constitute the greater part of the mob be considered in

[87] Kan. Gen. Stats. (1889), pars. 2590, 2591.

[88] Adams v. City of Salena, 58 Kan. 246, 48 Pac. 918.

[89] Adams v. City of Salena, 58 Kan. 246, 48 Pac. 918. As to proving under the Alabama statute that the plaintiff has enemies in the neighborhood, see De Kalb County v. Smith, 47 Ala. 407.

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determining the city's liability. He and his employees are only required to conduct themselves as ordinary, careful and prudent men would be expected to do under similar circumstances, and he cannot be charged with negligence because he and his employees decline to take human life to preserve the property from destruction.[90] But the owner will not be entitled to recover, if he has instigated or participated in the riot.[91]

§ 549. **Notice to be given.**—The statutes generally provide that notice shall be given to the municipal authorities of the threatened violence.[92] If the notice required by the statute has been given, and if it appears that the destruction of the property was in no manner aided, sanctioned or permitted by the negligence of the owner, and that he used all reasonable diligence to prevent the damages, a *prima facie* case is made by showing that a riotous mob assembled, broke into a building, and destroyed and took away property.[93] It is held that the notice may be given verbally.[94]

§ 550. **Immaterial ruling.**—If before the commencement of the riot the party injured knew of the danger, and had ample opportunity to notify the municipal authorities, a ruling of the court excluding evidence that during the riot he could not have reached the street to notify such authorities is immaterial.[95]

§ 551. **Sufficient time to give notice.**—The provision requiring notice to be given necessarily contemplates that there shall be sufficient time between the threat or attempt and the execution of it to permit of the giving of the notice, as it is not intended to

[90] Spring Valley Coal Co. v. City of Spring Valley, 65 Ill. App. 571, 96 Ill. App. 230.

[91] Wing Chung v. Los Angeles, 47 Cal. 531.

[92] Solomon v. Kingston, 24 Hun (N. Y.), 562; Donoghue v. Philadelphia County, 2 Pa. 230; Wing Chung v. Los Angeles, 47 Cal. 531; Spring Valley Coal Co. v. City of Spring Valley, 65 Ill. App. 571, 96 Ill. App. 230; Allegheny County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670; Newberry v. New York, 1 Sweeny (N. Y.), 369; Salisbury v. Washington County, 22 Misc. Rep. 41, 48 N. Y. Supp. 122; Schiellein v. Kings County, 43 Barb. (N. Y.) 490.

[93] Spring Valley Coal Co. v. City of Spring Valley, 65 Ill. App. 571.

[94] Donoghue v. Philadelphia County, 2 Pa. 230.

[95] Wong Chung v. Los Angeles, 47 Cal. 531.

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provide redress, available only in cases where the mob should proceed with so much deliberation as to allow their purpose to become known to the person whose property was about to be destroyed, and to deny it in cases where secrecy should be observed, and no suspicion should arise of any unlawful design until it had been accomplished.[96] Under the Wisconsin statute it is held that notice to the mayor by an employer does not inure to the benefit of an employee.[97]

§ 552. **Constitutionality of such statutes.**—Statutes of this character have been attacked as unconstitutional, but the constitutional right of the legislature to pass such laws has been uniformly sustained. "It cannot be doubted that the general purposes of the law are within the scope of legislative authority. The legislature has plenary power in respect to all subjects of civil government, which they are not prohibited from exercising by the constitution of the United States, or by some provision or arrangement of the Constitution of this state. This act proposes to subject the people of the several local divisions of the state consisting of counties and cities, to the payment of damages to property in consequence of any riot or mob within the county or city. The policy upon which the act is framed may be supposed to be to make good at the public expense the losses of those who may be so unfortunate as, without their own fault, to be injured in their property by acts of lawless violence of a particular kind which it is the general policy of the government to prevent; and further, and principally, we may suppose to make it the interest of every person liable to contribute to the public expense to discourage lawlessness and violence and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to maintain them that governments are instituted, and the means provided by this act seem to be reasonably adapted to

[96] Moody v. Board of Supervisors of Niagara County, 46 Barb. (N. Y.) 659. See, also, Salisbury v. Washington Co., 22 Misc. Rep. 41, 48 N. Y. Supp. 122; Solomon v. Kingston, 24 Hun (N. Y.), 562; Newberry v. New York, 1 Sweeny (N. Y.), 369. It is not necessary to give the notice if it would have been unavailing. Schiellein v. Kings County, 43 Barb. 490. See, also, Long v. City of Neenah, 128 Wis. 40, 107 N. W. 10.

[97] Long v. City of Neenah, 128 Wis. 40, 107 N. W. 10.

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the purposes in view."[98] Such statutes are not in conflict with the provision of the Constitution declaring that no person shall be deprived of his property without due process of law.[99]

§ **553. Liberal construction.**—Such statutes are both remedial and penal in their nature, and must be liberally construed.[100] The Pennsylvania statute was held to include every form of riotous disturbance, large or small. It was also held not to be necessary for a property owner to give notice to the municipal authorities unless he possesses a knowledge of an intention on the part of the mob to destroy his property, and there is sufficient time intervening to enable him to give the contemplated notice; where the authorities already have knowledge of the intention or attempt to destroy property, such a notice is not necessary.[101] The liability of a municipal corporation to make compensation for damages inflicted by a mob is not limited by the fact that they are unable to suppress the riot.[102] A statute which provides that damages may be recovered for loss of property or injury to life or limb applies to all bodily injuries, and is not confined to such injuries as result in death or the loss of a limb.[103] But in the interest of the taxpayers, the courts should see that the claims are established with reasonable certainty.[104]

[98] Darlington v. Mayor of New York, 31 N. Y. 164, 88 Am. Dec. 248. See, also, Underhill v. City of Manchester, 45 N. H. 214; County of Allegheny v. Gibson, 90 Pa. 397, 35 Am. Rep. 670; City of Chicago v. Cement Co., 178 Ill. 372, 69 Am. St. Rep. 321, 53 N. E. 68, 45 L. R. A. 848; Clear Lake Water Works v. Lake County, 45 Cal. 90; In re Pennsylvania Hall, 5 Pa. 204; Williams v. City of New Orleans, 23 La. Ann. 507; Luke v. City of Brooklyn, 43 Barb. 54; Bringham v. Bristol, 65 Me. 426, 20 Am. Rep. 711; Chadbourn v. Town of Newcastle, 48 N. H. 196; City of Atchison v. Irvine, 9 Kan. 350. A statute, however, limiting the recovery by one assaulted by a mob to five hundred dollars is unconstitutional. Caldwell v. Cuyahoga County, 8 Ohio Cir. Dec. 56.

[99] City of Iola v. Birnbaum, 71 Kan. 600, 81 Pac. 198.

[100] County of Allegheny v. Gibson, 90 Pa. 397, 35 Am. Rep. 670.

[101] County of Allegheny v. Gibson, 90 Pa. 397, 35 Am. Rep. 670.

[102] County of Allegheny v. Gibson, 90 Pa. 397, 35 Am. Rep. 670; Chadbourne v. New Castle, 48 N. H. 196; Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605.

[103] City of Iola v. Birnbaum, 71 Kan. 600, 81 Pac. 198.

[104] Fink v. City of New Orleans, 110 La. 84, 34 South. 138.

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§ **554. Common purpose of crowd.**—There should be some concert of action or common intention among the crowd to render it a mob. Under the Wisconsin statute it was held that a cause of action was not stated against a city by a complaint that alleged that the plaintiff was injured, while driving along a street on the evening of the Fourth of July, by the explosion of a cannon cracker, thrown and exploded by some one in a crowd of thirty or more, who were obstructing the sidewalk, and in a tumultuous manner engaged in exploding firecrackers, but that failed to allege that there was any common intent or purpose to injure the plaintiff.[105] Still, in Kentucky, where on Christmas Eve a crowd composed of a thousand persons assembled in the main street of a city, and discharged missiles loaded with explosives at private property, it was held that the gathering constituted a riotous or tumultuous assemblage of people within the meaning of the statute, and that the city, having notice of the danger, was responsible for the damages inflicted.[106] But although a crowd may assemble for a lawful purpose, it may subsequently unite in unlawful action and do injury for which a city will be liable.[107] Under the New Hampshire statute a city was held liable for damages, although the city could not have prevented the destruction, and although none of the rioters were inhabitants of the city.[108] And under this statute, a newspaper proprietor is entitled to recover damages where his printing materials have been destroyed by a mob. He may recover for damages resulting from the interruption or destruction of his business, and for injury to the goodwill of his paper, to the extent that such interruption and injury are the direct and natural results of the attacks of the mob.[109] A city, however, will not be liable where, in the daytime, an old, unoccupied building is demolished by a crowd of boys who disperse upon the appearance of a police

[105] Aaron v. City of Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

[106] City of Madisonville v. Bishop, 113 Ky. 106, 67 S. W. 269, 57 L. R. A. 130, citing State v. Brown, 69 Ind. 95, 35 Am. Rep. 210; Sanders v. State, 60 Ga. 126, and distinguishing Jolley's Admx. v. City of Hawesville, 89 Ky. 280, 12 S. W. 313.

[107] Solomon v. City of Kingston, 24 Hun (N. Y.), 562.

[108] Palmer v. City of Concord, 48 N. H. 211, 97 Am. Dec. 605.

[109] Palmer v. City of Concord, 48 N. H. 211, 97 Am. Dec. 605.

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officer, and who show no intent to resist opposition.[110] A keeper of a gambling-house is not entitled to recover for property destroyed in a riot in such house arising from a dispute as to a gambling transaction, where the statute provides that no one can recover if the destruction of his property was caused by his illegal or improper conduct.[111] A municipal corporation is not relieved from liability because the state militia were sent to the scene of the disturbance.[112] It is no defense, under the statute of Kansas, that the city was unable to prevent the injury.[113] But the fact that there was no rioting or fighting or unnecessary noise will not excuse a city from liability where a crowd assembles and unlawfully tears down buildings without notice or warning to the owner, and where the police do not endeavor to prevent the execution of the intention of those who have so assembled.[114] A municipal corporation cannot relieve itself from liability by showing that it used all its power to prevent the loss of property, or that it was also protected by the state and federal governments.[115] An owner of property is entitled to recover notwithstanding the fact that his employees, when attacked by

[110] Duryea v. New York, 10 Daly (N. Y.), 300.

[111] Underhill v. Manchester, 45 N. H. 214. As to injuries caused to property employed for unlawful purposes, see, also, Ely v. Niagara County, 36 N. Y. 297; Blodgett v. Syracuse, 36 Barb. (N. Y.) 526.

[112] Allegheny County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670. See, also, cases holding that a city is not responsible where the acts have been committed by an organized body of citizens acting for the state. Street v. New Orleans, 32 La. Ann. 577; and that it may be shown in mitigation of damages that an ordinance of the city was violated by the plaintiff in exposing their property in the public market, Fortunich v. New Orleans, 14 La. Ann. 115. A judgment for the plaintiff is not justified by evidence that on the afternoon of an election day a crowd, varying in number from eight to thirty, partially demolished with an ax, a crowbar, a rope and sticks an occupied building, and removed parts thereof, where it appeared that on notification police officers proceeded to the scene, and that the crowd thereupon dispersed, one boy eleven years of age being arrested, and where it appeared that the city had no notice of any such acts or of any threat to perform them, and that it had no reason to apprehend that an attempt would be made to injure the property. Adamson v. City of New York, 96 N. Y. Supp. 907, 110 App. Div. 98.

[113] City of Iola v. Birnbaum, 71 Kan. 600, 81 Pac. 198.

[114] Marshall v. City of Buffalo, 176 N. Y. 545, 68 N. E. 1119; S. C., 71 N. Y. Supp. 719, 63 App. Div. 603.

[115] City of Chicago v. Pennsylvania Co., 119 Fed. 497.

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the mob, might have lawfully resisted, but instead of doing so left the property on account of fear of the mob.[116]

[116] Spring Valley Coal Co. v. City of Spring Valley, 96 Ill. App. 230. The agreement to do the unlawful acts essential to constitute a crowd an unlawful assemblage need not be formal and express, but may be inferred from the facts and circumstances. Mitchell's Admr. v. Commissioners of Champaign County, 5 Ohio St. & C. P. Dec. 821.

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CHAPTER XVI.

CLAIMS AGAINST GOVERNMENTS.

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§ **555. In general.**—Claims against governments sometimes arise under the provisions of treaties, but usually are based upon

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the general principles of international law. We shall not examine in detail the many cases in which claims have been presented either against the government of the United States or by the United States in behalf of its own citizens against other governments, but shall state some of the more general rules applicable to claims against governments.[1] The treaty concluded between the United States and Spain on December 10, 1898, provided: "The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either government, or of its citizens or subjects, against the other government, that have arisen since the beginning of the late insurrection in Cuba, and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article."[2]

§ **556. Spanish war claims commission.**—In 1901, pursuant to this provision of the treaty, Congress passed an act authorizing the President to appoint five suitable persons, learned in the law, to constitute a commission, "whose duty it shall be, and it shall have jurisdiction, to receive, examine and adjudicate all claims of citizens of the United States against Spain, which the United States agreed to adjudicate and settle" by the treaty. The commission "shall adjudicate said claims according to the merits of the several cases, the principles of equity, and of international law." The commission was empowered to make all necessary or convenient rules for the transaction of business, the rules and mode of procedure to conform, so far as practicable, to the mode of procedure and practice of the circuit courts of the United States. The award made in favor of any claimant, it was provided, should be only for the amount of the actual and direct damage which the claimant should prove that he had sustained. No award was to be made for remote or prospective damages, nor was interest to be allowed on any claim. All awards were to be final, unless a new trial or hearing should be granted. The commission, when in doubt, it was provided, as to

[1] The numerous cases of this character that have arisen may be found in Moore's International Arbitrations and Moore's International Law Digest.

[2] 30 U. S. Stats. at Large, 1757.

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any question of law arising upon the facts before them, might state the facts and the question of law so arising, and certify the same to the supreme court of the United States for its decision.[3]

§ 557. Citizen must seek redress through his government.—If a citizen of one country is injured by another, redress for such act must be sought through his own government. "One nation treats with the citizens of another," says Mr. Chief Justice Waite, "only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself."[4]

§ 558. Foreigners excluded from suing.—The supreme court of the United States decided that subjects of other powers, who gave aid and comfort to the enemy during the war of the Rebellion were excluded from suing for such proceeds under the abandoned and captured property act. "It may be that foreigners," said the court, "who have given aid and comfort to the enemies of the United States are in equity as much entitled to the privileges of the act as the pardoned enemies themselves; but that is for Congress to determine, and not for us. We have decided that the pardon closes the eyes of the courts to the offending acts, or, perhaps more properly, furnishes conclusive evidence that they

[3] 31 U. S. Stats. at Large, 879.

[4] United States v. Dickelman, 92 U. S. 520, 23 L. ed. 742.

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never existed as against the government. It is with the legislative department of the government, not the judicial, to say whether the same rule shall be applied in cases where there can be no pardon by the President. A pardon of an offense removes the offending act out of sight; but if there is no offense in the eye of the law, there can be no pardon. Consequently, the acts which are not extinguished by a pardon remain to confront the actor."[5]

§ 559. **Suits by one state against another.**—A state cannot permit the use of its name in a suit for the benefit of one of its own citizens against another state, as it cannot be deemed to be an independent nation possessing the right of making an imperative demand upon another independent state for the payments of debts due to citizens of the former; nor can it create a controversy by assuming the prosecution of such debts.[6] The circuit court of the United States has no jurisdiction to entertain a suit by aliens, the object of which is to enjoin the attorney general and the attorneys of the several countries of a state from bringing suit in the name of the state for the purpose of enforcing the collection of taxes, for whose payment coupons of the bonds of such state had been tendered. Such a suit is, in law and in effect, a suit by the subjects of a foreign state against a state of the Union, and comes within the prohibition of the eleventh amendment to the Constitution. There exists no remedy against the state for a breach of its contract, and the attempt indirectly by injunction to compel the specific performance of the contract, by forbidding the performance of those acts which constitute the breaches of the contract, is in effect, even though not in form, a suit against the state.[7] While a suit

[5] Young v. United States, 97 U. S. 68, 24 L. ed. 992.

[6] New Hampshire v. Louisiana, 108 U. S. 90, 2 Sup. Ct. Rep. 183, 27 L. ed. 661. In suits against officers of a state, jurisdiction has been denied where the suits were in effect against the state. Cunningham v. Macon etc. R. R. Co., 109 U. S. 450, 3 Sup. Ct. Rep. 295, 27 L. ed. 993; Ex parte Ayers, 123 U. S. 489, 8 Sup. Ct. Rep. 164, 31 L. ed. 216; Pennoyer v. McConnaughy, 140 U. S. 12, 11 Sup. Ct. Rep. 702, 35 L. ed. 366. Where the state is the real party, a removal has been refused. Ferguson v. Ross, 38 Fed. 163, 3 L. R. A. 324; State v. Columbus etc. R. Co., 48 Fed. 628.

[7] Ex parte Ayers, 123 U. S. 489, 8 Sup. Ct. Rep. 164, 31 L. ed. 216.

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against the officers of a state to compel them to perform its contracts is, in substance, a suit against the state itself, still an injunction may be issued against an officer of a state to prevent him from executing a statute of the state conflicting with the constitution of the United States, when by such execution the rights and privileges of a private person would be violated and destroyed.[8]

§ 560. **Presentation through Department of State.**—Aliens who desire to present claims against the United States for unliquidated damages must present them to the Department of State, through diplomatic agencies.[9] Mr. Fish, Secretary of State, where claims were presented by French citizens and other aliens through Congress to the Committee on War Claims said: "I have to remark that such presentation is entirely inconsistent with usage, which requires that aliens must address this government only through the diplomatic representatives of their own governments. This Department refuses to entertain applications or to receive claims from aliens, except through a responsible presentation by the regularly accredited representative of their government."[10]

§ 561. **Action against other governments.**—Before the United States will present the claim of one of its citizens to another government, there must be presented to the Secretary of State a petition and a sworn statement showing in detail the injury suffered, and such proof as may be secured to sustain the averments of the petition.[11] If the claim arises from contract, the diplomatic representative of the United States will not interfere in the absence of specific instructions, and if it arise from a tort, he will

[8] Pennoyer v. McConnaughy, 140 U. S. 12, 11 Sup. Ct. Rep. 699, 35 L. ed. 363.

[9] Mr. Magoon, Law Officer, Division of Insular Affairs, War Dept., Feb. 6, 1901, Magoon's Rep. 338; Report No. 498, Committee on War Claims, May 2, 1874, 43 Cong. 1st Sess.

[10] To Mr. Lawrence, M. C., April 22, 1874, Magoon's Rep. 340.

[11] Mr. Marcy, Secretary of State, to Mr. Crain, Feb. 24, 1854, 42 MS. Dom. Let. 244; Mr. Uhl, Acting Secretary of State, to Attorney General, June 23, 1894, 197 MS. Dom. Let. 449.

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also await instructions before acting, unless an assault has been made against the person of the claimant, or there is an immediate necessity for acting before it is possible to consult the Department of State.[12]

§ **562. Rules of Department of State.**—The Department of State of the United States has published rules for the prosecution of claims by citizens of the United States against foreign governments, not founded on contract, in the prosecution of which they may wish the aid of the Department of State. These rules, it is stated, are substantially those which have been adopted by commissions organized under conventions between the United States and foreign governments for the adjustment of claims. The Department advises that, in preparing and forwarding their papers, citizens conform as nearly as possible to these rules, which are as follows:

"Each claimant should file a memorial, *in triplicate*, properly dated, setting forth minutely and particularly the facts and circumstances from which the right to prefer such claim is derived by the claimant. This memorial should be verified by his or her oath or affirmation.

"All subsequent communications to the Department in the nature of statements of fact, arguments, or briefs should likewise be furnished *in triplicate*.

"The memorial and all the accompanying papers should have a margin of at least one inch on each side of the page, so as to admit of their being bound in volumes for preservation and convenient reference; and the pages should succeed each other, like those of a book, and be readable without inverting them.

"When any of the papers mentioned in rule 11 are known to have been already furnished to the Department by other claimants, it will be unnecessary to repeat them in a subsequent memorial. A particular description, with a reference to the date under which they were previously transmitted, is sufficient.

"Nor is it necessary, when it is alleged that several vessels have been captured by the same cruiser, to repeat in each memorial the circumstances in respect to the equipment, arming, manning, flag, etc., of such cruiser, which are relied upon as the evi-

[12] Instructions to Diplomatic Officers (1897), sec. 174, p. 68.

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dence of the responsibility of a foreign government for its alleged tortious acts. A simple reference to an adoption of one memorial in which such facts have been fully stated, will suffice.

"It is proper that the interposition of this government with the foreign government against which the claim is presented should be requested in express terms, to avoid a possible objection to the jurisdiction of a future commission on the ground of the generality of the claim.

"Claims of citizens against the government of the United States are not generally under the cognizance of this department. They are usually subjects for the consideration of some other department or of the Court of Claims, or for an appeal to Congress.

"In every memorial should be set forth—

"1. The amount of the claim; the time when and place where it arose, the kind or kinds and amount of property lost or injured; the facts and circumstances attending the loss and injury out of which the claim arises; the principles and causes which lie at the foundation of the case.

"2. For and in behalf of whom the claim is preferred, giving Christian name and surname in full.

"3. Whether the claimant is now a citizen of the United States. and, if so, whether he is a native or naturalized citizen and where is now his domicile; and, if he claims in his own right, then whether he was a citizen when the claim had its origin and where was then his domicile; and, if he claims in the right of another. then whether such other was a citizen when the claim had its origin and where was then and where is now his domicile; and if, in either case, the domicile of the claimant at the time the claim had its origin was in any foreign country, then whether such claimant was then a subject of the government of such country or had taken any oath of allegiance thereto.

"4. Whether the entire amount of the claim does now, and did at the time when it had its origin, belong solely and absolutely to the claimant; and, if any other person is or has been interested therein, or in any part thereof, then who is such other person and what is or was the nature and extent of his interest; and how, when, and by what means and for what considerations the transfer of rights or interests, if any such were made, took place between the parties.

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"5. Whether the claimant, or any other who may at any time have been entitled to the amount claimed, or any part thereof, has ever received any, and, if any, what, sum of money or other equivalent or indemnification for the whole or any part of the loss or injury upon which the claim was founded; and, if so, when and from whom the same was received.

"6. All testimony should be in writing, and upon oath or affirmation, duly administered according to the laws of the place where the same is taken, by a magistrate or other person competent by such laws to take depositions, having no interest in the claim to which the testimony relates and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such magistrate or other person authorized to take such testimony, should be certified by him; and, if not known, should be certified on the same paper upon oath by some other person known to such magistrate having no interest in such claim and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition should be reduced to writing by the person taking the same, or by some person in his presence having no interest and not being agent or attorney of any person having an interest in the claim, and should be carefully read to the deponent by the magistrate before being signed by him, and this should be certified.

"7. Depositions in any city, port, or place without the limits of the United States may be taken before any consul or other public civil officer of the United States resident in such city, port, or place, having no interest, and not being agent or attorney of any person having an interest, in the claim to which the testimony so taken relates. In all other cases, whether in the United States or in any foreign place, the right of the person taking the deposition to administer oaths by the laws of the place must be certified.

"8. Every affiant or deponent should state in his deposition his age, place of birth, residence, and occupation, and where was his residence and what was his occupation at the time the events took place in regard to which he deposes; and must also state if he have any, and, if any, what, interest in the claim to support which his testimony is taken; and, if he have any contingent interest in the same, to what extent, and upon the happening of

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what event, he will be entitled to receive any part of the sum which may be awarded. He should also state whether he be the agent or attorney of the claimant or of any person having an interest in the claim.

"9. Original papers exhibited in proof should be verified as originals by the oath of a witness, whose credibility must be certified as required in the sixth of these rules; but, when the fact is within the exclusive knowledge of the claimant, it may be verified by his own oath or affirmation. Papers in the handwriting of anyone who is deceased or whose residence is unknown to the claimant may be verified by proof of such handwriting and of the death of the party or his removal to places unknown.

"10. All testimony taken in any foreign language and all papers and documents in any foreign language which may be exhibited in proof should be accompanied by a translation of the same into the English language.

"11. When the claim arises from the seizure or loss of any ship or vessel, or the cargo of any ship or vessel should be produced, together with the original clearance, manifests, and all other papers and documents required by the laws of the United States which she possessed on her last voyage from the United States, when the same are in the possession of the claimant or can be obtained by him, and, when not, certified copies of the same should be produced, together with his oath or affirmation that the originals are not in his possession and cannot be obtained by him.

"12. In all cases where property of any description for the seizure or loss of which a claim has been presented was insured at the time of such seizure or loss, the original policy of insurance, or a certified copy thereof, should be produced.

"13. If the claimant be a naturalized citizen of the United States, a copy of the record of his naturalization, duly certified, should be produced.

"14. Documentary proof should be authenticated by proper certificates or by the oath of a witness.

"15. If the claimant shall have employed counsel, the name of such counsel should, with his address, be signed to the memorial and entered upon the record, so that all necessary notices may be addressed to such counsel or agent respecting the case." [13]

[13] Circular Relating to Claims Against Foreign Governments, Department of State, March 5, 1906.

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§ **563. Discretion of government.**—If the damages sought are speculative and exorbitant in amount, the State Department will not present a claim to a foreign government, although the claim is based on a wrong actually committed.[14] The government will exercise a wise and judicious discretion, when an application is made to it to present the claim of a citizen against a foreign power.[15] When the claim is passed through diplomatic channels, it is a national claim as against the foreign government, although between the United States and its citizens the claim may be private. "Over such claims the prosecuting government has full control. It may, as a matter of pure right, refuse to present them at all; it may surrender them or compromise them without consulting the claimants. . . . . The rights of the citizens for diplomatic redress are as against his own not the foreign government."[16] As stated by Mr. Marcy, "the government of the United States does not feel called upon to interpose in behalf of every just claim held by its citizens against foreign nations. When individuals see proper to intrust their property to the safekeeping of another government it is to be supposed that they have satisfied themselves of the ability and intention of that government to restore that which may have been confided to it, and the deposit is accordingly made upon personal risk."[17]

§ **564. Policy of Great Britain.**—In a circular letter addressed in 1848 to the representatives of Great Britain in foreign states, Lord Palmerston stated that as some misconception appeared to exist as to the right of the government to interfere in support of the unsatisfied claims of British subjects holding public bonds and securities of foreign states, he declared that it was entirely a matter of discretion, and not one of international right. As a matter of international right alone, he asserted that the government of one country possesses the undoubted right to take up as a matter of diplomatic negotiation any well-founded complaint

[14] Mr. Marcy, Secretary of State, to Mr. Munro, June 10, 1856, 45 MS. Dom. Let. 45.

[15] United States v. La Abra Silver Min. Co., 29 Ct. of Cl. 432; Black, 9 Op. Atty. Gen. 338.

[16] Mr. Frelinghuysen, Secretary of State, to Messrs. Mullan & King, Feb. 11, 1884.

[17] Mr. Marcy, Secretary of State, to Mr. Egbert, Nov. 15, 1854, 43 MS. Dom. Let. 219.

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preferred by any of its citizens against the government of another country, but he added:

"It has hitherto been thought by the successive governments of Great Britain undesirable that British subjects should invest their capital in loans to foreign governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign governments, who may be either unable or unwilling to pay the stipulated interest thereupon, the British government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions. For the British government has considered that the losses of imprudent men, who have placed mistaken confidence in the good faith of foreign governments, would prove a salutary warning to others, and would prevent any other foreign loans from being raised in Great Britain, except by governments of known good faith and ascertained solvency. But nevertheless it might happen that the loss occasioned to British subjects by the nonpayment of interest on loans made by them to foreign governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it might become the duty of the British government to make these matters the subject of diplomatic negotiation." [18]

§ **565. Objections to presentation of claims.**—Although a citizen may not lose his citizenship, he may conduct himself in such a manner as to forfeit to a certain degree the right to claim national protection.[19] It was sought, by an inquiry made by the consul of the United States at Alexandria, Egypt, to ascertain whether citizens of the United States, who, although graduates of West Point or Annapolis, had been engaged on the side of the Confederacy in the Civil War, and who were in the service of the Khedive of Egypt, were entitled to the protection of the consulate. The response returned by the Department of State was: "It is conceived to be the duty of this government impartially to protect all citizens abroad in conformity with treaties and the pub-

[18] Hall's Int. Law, 294, 295.

[19] 3 Moore Int. Arbitrations, 2729.

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lic law. No exception can properly be made in regard to persons belonging to the classes to which you refer, unless that exception shall be required by some constitutional provision or statutory enactment. It is believed there is none applicable in this instance." If, however, these persons had, by their express contract with the Khedive, renounced the right of appeal to their own government, no ground would then exist for interference in their behalf.[20] It was announced by the attorney general of the United States, that when jurisdiction of any particular case has been lawfully assumed by the government a co-ordinate department should decline to interfere, and hence, the political department of the government will postpone the consideration of questions relating to reclamation and indemnity, where jurisdiction has been acquired by the courts in cases of maritime capture, until the judiciary has finally fulfilled its functions.[21]

§ 566. **Fraud in claim.**—Fraud will justify or compel the government to relinquish or refuse to present a claim in behalf of its citizens. Mr. Seward says that it has become an established usage, "having the authority of a principle, in the correspondence between enlightened governments, in relation to the claims of citizens or subjects, that any deception practiced by a claimant upon his own government in regard to a controversy with a foreign government for the purpose of enhancing his claim, or influencing the proceedings of his government, forfeits all title of the party attempting such deception to the protection and aid of his government in the controversy in question, because an honorable government cannot consent to complicate itself in a matter in which it has itself been made or attempted to be made the victim of a fraud, for the benefit of the dishonest party."[22] So if an act on which a claim is based is against public policy, the government will refuse its assistance.[23] A citizen of the United States requested the Department of State to support his claim for services which he claimed he had rendered under a contract with

[20] Mr. Fish, Secretary of State, to Mr. Butler, Oct. 5, 1871, MS. Inst. Barbary Powers, XV, 62.

[21] Bates, 11 Op. Atty. Gen. 117.

[22] To Lord Lyons, British Minister, May 30, 1862, MS. Notes to Great Britain, IX, 187.

[23] Mr. Seward, Secretary of State, to Mr. Whitney, July 24, 1868, 71 MS. Dom. Let. 119.

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the President of Venezuela to obtain a revision of the awards made by a commission under a treaty between that country and the United States. The Department, however, said in reply: "The government of the United States cannot recognize a contract alleged to have been entered into by a citizen of the United States with the executive or agent of another government, for the purpose of securing the setting aside of a treaty between this and such other government. The services which you claim to have performed related chiefly to the procurement of action on the part of Congress, these services being performed for the government of Venezuela. Under the constitution of the United States, the only organ of communication between this and foreign governments is the President. This Department cannot look with anything but disapprobation upon a foreign government seeking to approach a branch of the government of the United States through another channel. It may be stated as a fact, although it is not material, that at the very time at which you allege that your employment began this Department was demanding of the government of Venezuela the execution of the treaty of 1866."[24] For these reasons the United States refused to interest itself in the presentation of this claim.

§ **567. Citizenship.**—The government of the United States interferes only in behalf of its own citizens.[25] The making of a declaration of intention to become a citizen will not make the declarant a citizen.[26] Where injuries had been committed while a person was a German subject, and before he became a citizen of the United States, the Department of State said: "If denial of justice subsequent to the acquisition of citizenship takes the case out of the rule that a claim maturing before citizenship cannot be the subject of diplomatic intervention, then the rule would itself be abrogated, since there is no litigated case in which such denial could not be set up."[27] In 1819 Lord Castlereagh said

[24] Mr. Blaine, Secretary of State, to Mr. Matchett, March 19, 1891, 181 MS. Dom. Let. 273.

[25] Mr. Forsyth, Secretary of State, to Mr. Champly, April 15, 1837, 29 MS. Dom. Let. 1; The Vanderput, 37 Ct. of Cl. 396; Bodemüller v. United States, 39 Fed. 437

[26] Mr. Frelinghuysen, Secretary of State, to Mr. Alfonso, Nov. 13, 1884, 153 MS. Dom. Let. 194.

[27] Mr. Porter, Acting Secretary of State, to Messrs. Kennedy & Shellaberger, Jan. 4, 1887, S. Doc. 287, 57 Cong. 1st. Sess.

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that two British subjects had been considered by the Cabinet as having forfeited their rights to protection from their government, because "they had identified themselves, in part at least, with the Indians, by going amongst them with other purposes than those of innocent trade; by sharing in their sympathies too actively when they were upon the eve of hostilities with the United States; by feeding their complaints; by imparting to them counsel; by heightening their resentments, and thus at all events increasing the predispositions which they found existing to the war, if they did not originally provoke it."[28] "A vessel of the United States voluntarily entering into the service of a foreign power in aid of military or naval operations must be regarded as relying exclusively upon the protection of that power, and as renouncing, while such employment continues, any claim to the protection of the United States."[29]

The Portuguese government seized a railway constructed in Portugal, by Edward MacMurdo, a citizen of the United States, operating through a Portuguese corporation, and against this action protests were made both by the United States and Great Britain, to which the government of Portugal replied that it could only deal with the Portuguese company, through which all rights of the American and British stockholders should be maintained. Lord Salisbury, in his instructions to the British minister at Lisbon, said that the British investors had suffered "a grievous wrong in consequence of the forcible confiscation by the Portuguese government of the line and the materials belonging to the British company, and of the securities on which the debentures of the British company had been advanced; and that for that wrong Her Majesty's government are bound to ask for compensation from the government of Portugal."[30] Mr. Blaine, in his letter to the American Minister at Lisbon, declared that upon a full consideration of the circumstances, "this government is forced to the conclusion, that the violent seizure of the railway by the Portuguese government was an act of confiscation, which renders it the duty of the government of the United States to ask that compensation should be made to such citizens of this coun-

[28] Mr. Rush, Minister at London, to Mr. Adams, Secretary of State, MS. Desp. from England.

[29] Mr. Fish, Secretary of State, to Mr. Murray, Dec. 7, 1869, 82 MS. Dom. Let. 453.

[30] Parl. Pop. Cd. 5903, p. 58.

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try as may be involved. With respect to the case of Colonel MacMurdo, who is now represented by his widow, Katherine A. MacMurdo, his sole executrix and legatee, it is to be observed that by the terms of the concession the company which he was required to form was to include himself, and that his personal liability was not merged in that of the company. But in any case, the Portuguese company, being without remedy, and having now practically ceased to exist, the only recourse of those whose property has been confiscated is the intervention of the respective governments."

A protocol was signed at Berne July 13, 1891, between the United States, Great Britain and Portugal, by which they agreed to submit to a tribunal of arbitration the question of "the amount of the compensation due by the Portuguese government to the claimants of the other two countries, in consequence of the rescission of the concession of the Lourenco Marques railroad and the taking possession of that railroad by the Portuguese government." This tribunal made an award of damages, which the Portuguese government paid.[31]

§ 568. Policy of the United States.—It is the policy of the United States to refuse to present a claim to a foreign government, founded on transactions in which the neutrality laws of the United States were violated.[32] The Department of State will not entertain a claim against the United States, which the claimant has elected to present to Congress, as long as the claim is before Congress.[33] A widow, a citizen of the United States, succeeded as an heir to the claim of her husband, an alien, against a foreign government, and when she sought, in her character as an American citizen, the good offices of the government, the Department of State granted her request. In doing so, it said that "while, in the opinion of the Department, a citizen of the United States is not entitled to invoke the assistance of this government in respect of a claim against another government acquired from a foreigner by marriage and assignment (by partnership arrange-

[31] 2 Moore's International Arbitration, 1865-1889.

[32] Mr. Bayard, Secretary of State, to Messrs. Morris and Fillette, July 28, 1888, 169 MS. Dom. Let. 263.

[33] Mr. Fish, Secretary of State, to Mr. Schlözer, German Minister, Sept. 14, 1874, MS. Notes to German Leg. IX, 44.

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ment or otherwise), yet it is believed that where such claim comes to the wife by succession upon the death of her husband, as in this case, the offices of this government should be extended to her."[34]

§ 569. **Naturalization has no retroactive effect.**—Naturalization cannot be allowed to have a retroactive effect, so as to induce the government to intercede in a claimant's behalf.[35] The government does not undertake, by adopting an alien as a citizen, the patronage of a claim which he may have against another government. "To admit that he can charge it with this burden," said Mr. Fish, Secretary of State, "would allow him to call upon a dozen governments in succession, to each of which he might transfer his allegiance, to urge his claim. Under such a rule the government supposed to be indebted could never know when the discussion of a claim would cease. All governments are, therefore, interested in resisting such pretensions."[36] On another occasion Mr. Fish stated that "it would be a monstrous doctrine, which this government would not tolerate for a moment, that a citizen of the United States, who might deem himself injured by the authorities of the United States or of any state, could, by transferring his allegiance to another power, confer upon these powers the right to inquire into the legality of the proceedings by which he may have been injured while a citizen."[37]

§ 570. **Assignability of right.**—The United States will not "recognize an assignment of a claim against a foreign country made by a citizen or subject of that country to a citizen of this for the purpose of invoking diplomatic aid in the recovery thereof. Still less will it undertake to aid in the recovery of claims against subjects of foreign countries which originally accrued in favor of their fellow-subjects and have been assigned by the lat-

[34] Mr. Hill, Assistant Secretary of State, to Messrs. Coudert Brothers, June 9, 1900, 245 MS. Dom. Let. 484.

[35] Mr. Marcy, Secretary of State, to Mr. Ujhazi, Aug. 26, 1856, 45 MS. Dom. Let. 468.

[36] 89 MS. Dom. Let. 348, May 16, 1871.

[37] To Mr. Bachiller, April 8, 1874, MS. Dom. Let. 43.

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ter to American citizens."[38] Mr. Evarts, while Secretary of State, forcibly expressed the position of the government by declaring: "An assignment of a claim by a foreigner, or another government to a citizen of the United States, even if such claim be founded in tort, is not conceived to impose on this government any obligation to interfere in behalf of such citizen, in respect of the government against which the complaint is made. This rule, however, is especially applicable in matters of contract between a foreigner and another government, or where a citizen of the United States becomes the assignee of the contract."[39]

§ 571. **Assignment of award.**—Where an award has been made by the Commissioners of Alabama Claims under the treaty of 1871 between the United States and Great Britain, it constitutes a part of the estate of the person in whose favor it is made, and will pass to his assignee in bankruptcy. Such an assignee is authorized to take vested rights *in rem* and *in re* possibilities coupled with an interest in claims arising out of property.[40] Mr. Justice Lamar, in speaking of these claims, said: "Was the claim in this case 'property' in any sense of the term? We think it was. Who can doubt but that the right to prosecute this claim before the Court of Commissioners of Alabama Claims would have survived to their legal representatives had the original claimants been dead at the passage of the act of 1882. If so, the money recovered would have been distributable as assets of the estate. While, as already stated, there were no means of compelling Congress to distribute the fund received in virtue of the Geneva award, and while the claimant was remediless with respect to any proceedings by which he might be able to retrench his losses, nevertheless there was at all times a moral obligation on the part of the government to do justice to those who had suffered in property. As we have shown from the history of the proceedings leading up to the organization of the tribunal at Geneva, these war premiums of insurance were recognized by the government of the United States as valid claims, for which satisfaction should be guaranteed. There was thus at all times a possibility

[38] Mr. Gresham, Secretary of State, to Mr. McDonald, Minister to Persia, Nov. 11, 1893; For. Rel. 1894, 485.

[39] To Mr. Hodgskin, Oct. 25, 1877, 120 MS. Dom. Let. 238.

[40] Williams v. Heard, 140 U. S. 529, 11 Sup. Ct. Rep. 885, 35 L. ed. 550.

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that the government would see that they were paid. There was a possibility of their being at some time valuable. They were rights growing out of property—rights, it is true, that were not enforceable until after the passage of the act of Congress, for the distribution of the fund. But the act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All that the act of Congress did was to provide a remedy for the enforcement of that right."[41]

§ 572. **Claim of bankrupt.**—A claim of a bankrupt against a foreign government will be transferred to his assignee in bankruptcy, but if the claim is vaguely described in the schedule of assets, and denominated worthless, it will not, on a general sale of his accounts, notes and judgments, pass to a purchaser, who acts for the benefit of the bankrupt with money supplied by the latter, where merely a nominal sum was paid, and the claim had a large value.[42]

§ 573. **Resort to local remedies.**—It is a rule universally admitted that the regular course of justice will not be interfered with until the foreigner claiming to have been injured shall have proceeded to the court of last resort having jurisdiction;[43] and unless the injured party thus prosecutes his case, the government of the United States is not obligated to make compensation.[44] In a case where one state of the Union sought to recover from another state on bonds and coupons, in a suit brought by the state as assignee, Mr. Chief Justice Waite quoted with approval the language of Sir Robert Phillmore: "As a general rule, the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the state."[45] The chief justice himself said: "There is no principle of international law which makes it the duty of one nation to assume the collection of the claims against

[41] Williams v. Heard, 140 U. S. 529, 11 Sup. Ct. Rep. 885, 35 L. ed. 550.

[42] Phelps v. McDonald, 99 U. S. 298, 25 L. ed. 473. See, also, Lewis v. Bell, 17 How. (U. S.) 616, 15 L. ed. 203; Clark v. Clark, 17 How. (U. S.) 315, 15 L. ed. 77.

[43] Randolph, 1 Op. Atty. Gen. 25.

[44] Lincoln, 5 Op. Atty. Gen. 692.

[45] Citing 2 Phillmore's Int. Law, p. 12.

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another nation, if the citizens themselves have ample means of redress without the intervention of their government."[46] Where a tort had been committed on an American citizen by a mob in Cuba, Mr. McLane stated that while a government was obligated to protect its citizens and to see that where justice is denied to them by a foreign nation, that their injuries are redressed, "yet this obligation always presupposes a resort, in the first instance, to the ordinary means of defense or reparation which are afforded by the laws of the country in which their rights are infringed, to which laws they have voluntarily subjected themselves by entering within the sphere of their operation, and by which they must consent to abide. It would be an unreasonable and oppressive burden upon the intercourse between nations, that they should be compelled to investigate and determine, in the first instance, every personal offense committed by the citizens of the one against the other."[47]

§ 574. **Courts of South American Republics.**—Complaints have frequently been made that the courts of the South American republics were inefficient, and that justice could not be secured in them at all or only after great delay. But Mr. Seward said: "We must, however, continue to repose confidence in their independence and integrity, or we must take the broad ground that those states are like those of oriental semi-civilized countries—outside the pale within which the law of nations, as generally accepted by Christendom, is understood to govern. The people who go to these regions and encounter great risks in the hope of great rewards must be regarded as taking all the circumstances into consideration, and cannot, with reason, ask their government to complain that they stand on a common footing with native subjects in respect to the alleged wants of an able, prompt, and conscientious judiciary. We cannot undertake to supervise the arrangements of the whole world for litigation, because American citizens voluntarily expose themselves to be concerned in their deficiencies."[48]

[46] New Hampshire v. Louisiana, 108 U. S. 76, 2 Sup. Ct. Rep. 176, 27 L. ed. 662.

[47] To Mr. B. J. Shain, May 28, 1834, 26 MS. Dom. Let. 263.

[48] To Mr. Burton, Minister to Colombia, April 27, 1866; No. 137, Dip. Cor. 1866, III, 522, 523.

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§ 575. **Claim based on treaty with Italy.**—In 1901 the complaint of an Italian subject was presented to the Department of State, claiming that a judgment entered in Colorado was in violation of the treaty of 1871 between the United States and Italy. The portions of the treaty which it was contended related to the subject were articles III and XIII. The first of these (article III) declared that:

"The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed upon the natives. . . . ."

The second provided (Art. XVIII): "The citizens of either party shall have free access to the courts of justice in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives; they shall, therefore, be free to employ, in defense of their rights, such advocates, solicitors, notaries, agents, and factors as they may judge proper in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them; and likewise at the taking of all examinations and evidences which may be exhibited in the said trials."

In that case, the widow of Pietro Ferrara, an Italian subject, instituted a suit in Colorado against a mining company to recover damages for the death of her husband, who was an employee of the company, and who was injured by the falling of a large rock upon him while employed by the company, and whose death was the result of his injuries. The court dismissed the action on the ground that the plaintiff was a nonresident alien, and not entitled to prosecute it in the courts of that state. An appeal was taken and was granted upon condition that the plaintiff should file an appeal bond. She did not perfect the appeal, but filed a motion for a new trial, and as one of the grounds of the motion it was asserted that the judgment was in violation of the terms of the treaty above set forth. Her motion for a new trial having been denied, she appealed to the Italian government to make a demand upon the United States for the sum of five thousand dollars, for

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which, according to the allegations of the demand, "she was deprived the right of litigation in violation of the said treaty between the two countries, and such other or further sum as may be just and equitable for the affront and indignity which she received by being thus discriminated against." Mr. Hay, Secretary of State, said in reply that the case was not one for diplomatic intervention, because the plaintiff had not exhausted her judicial remedy. "It frequently happens," said he, "that litigants are denied rights by the decisions of inferior courts and are obliged, in order to establish such rights, to carry the case to the courts of last resort. The plaintiff in the present case should pursue the judicial remedy afforded by our laws, perfecting her appeal to the court of appeals (the supreme court) of Colorado, and, if necessary thereafter, by appropriate proceedings, bring the case before the supreme court of the United States. Furthermore, under the laws of the United States, the circuit courts of the United States have original jurisdiction of civil suits like the present one to which an alien is a party. It is suggested for the consideration of the attorneys of the plaintiff whether an original suit should not be brought in the circuit court of the United States for the district of Colorado. Until the remedy of recourse to the civil tribunals has been exhausted by the plaintiff, and justice is finally denied her, there appears to be no ground for the presentation of a diplomatic claim."[49]

§ 576. Another instance.—It would take us too far afield to mention the many cases in which these principles have been applied, but we may call attention to another instance in which the views held by the United States were clearly expressed. John H. Tunstall, a British subject, residing in the territory of New Mexico, was killed. He was the owner of a ranch in that territory, and had a partner, named McSween. An attachment had been issued against the property of the latter, and the sheriff authorized a deputy to serve the writ, and he levied on certain livestock. Service of the writ was admitted by Tunstall, who said to the deputy that he might attach the stock and place it in

[49] Mr. Hay, Secretary of State, to Signor Carignani, Italian Chargé, Aug. 24, 1901, For. Rel. 1901, 308. The United States cannot recognize any obligation to indemnify foreign residents for a boycott. See section 544, ante.

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charge of some one until such time as the courts should determine the question of ownership as between him and his partner, McSween. Instead of following this course, the deputy departed, and shortly after returned to the ranch with a posse. In the meantime Tunstall had collected the stock and had proceeded to drive it to the county seat, some miles distant. The deputy sheriff then authorized one of the posse with eighteen others to pursue Tunstall and capture the stock, and after pursuing him for a distance of eighteen miles they overtook him and began to fire, and although Tunstall sought to escape, he was shot in his flight and killed. The shooting was witnessed by only three persons, and subsequently two of these died through violence, and the third was not punished nor could he be located. It was contended by the British government that the members of the party in pursuit were the personal enemies of Tunstall, and that the sheriff, through the action of his deputy and the posse, was guilty of murder committed in the execution of legal process. Sir Edward Thornton, the British Minister, asserted that the father of the deceased possessed a pecuniary interest in the life of his son, arising from business operations conducted by him, and therefore, as the sheriff was the agent of the United States, he, the father, was entitled to recover indemnity from the United States. The Minister asserted that the father was powerless to recover damages from the Territory of New Mexico by legal proceedings or other means, and that while an American citizen might in a similar case appeal to Congress, an alien could not pursue this course, and, as a result, the United States must be looked to for compensation. Mr. Evarts said he did not believe that the killing of an American citizen under similar circumstances in one of the British colonies would constitute a claim against the government of Great Britain.[50]

It was suggested by Mr. Frelinghuysen, as Secretary of State, that the claim be referred to the court of claims, but the British government declined to accept this suggestion unless the United States should concede its liability. A re-examination having been requested, Mr. Bayard, among other grounds, held there was no merit in the claim, because "in countries subject to the Eng-

[50] MS. Notes to Great Britain, XVIII, 461; 6 Moore's Int. L. D. 663.

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lish common law, where there is an opportunity given of a prompt trial by a jury of the vicinage, damages inflicted on foreigners on the soil of such countries must be redressed through the instrumentalities of courts of justice, and are not subject to diplomatic intervention by the sovereign of the injured party."[51]

§ 577. **Discrimination against American citizens.**—If an American citizen is more harshly treated, or more severely punished, because he is a native-born citizen of the United States, "it would be a clear case of the violation of treaty obligations, and would demand the interposition of the government."[52]

Mr. Bayard, who, as Secretary of State, declined to present a claim of an American citizen for the murder of his father in Mexico, expressed the principles of international law to be that: "We can no more permit ourselves to seek redress for injuries inflicted by private individuals in Mexico on one of our citizens than we could permit Mexico to intervene to seek redress for injuries inflicted on Americans by private individuals in the United States. The rule is that where the judiciary is recognized in a country co-ordinate with the executive, having committed to it all suits for redress of injuries inflicted on aliens as well as on citizens, then the judiciary and not the executive must be appealed to for redress. There are, it is true, two exceptions recognized to this rule: First, when there is undue discrimination against the party injured on account of his nationality; secondly, where the local tribunals are appealed to, but justice was denied in violation of those common principles of equity which are part of the law of nations."[53]

[51] Mr. Bayard to Mr. West, British Minister, June 1, 1885, For. Rel. 1885, 450. A number of other similar instances can be found in 6 Moore's Int. L. D. 656-677.

[52] Report by Mr. Webster, Secretary of State, to the President; 6 Webster's Works, 530.

[53] To Mr. Copeland, Feb. 23, 1886, 159 MS. Dom. Let. 138.

In 1904, the bandit Raisuli carried away an American citizen named Ion Pericardis, about three miles from Tangiers. The consul-general of the United States informed the authorities of Morocco that he would hold them personally responsible for the act of the bandit, and a squadron was ordered sent to Tangiers. On July 22, 1904, Mr. Hay, Secretary of State, sent his famous dispatch to the American Consul-General that the United States "wants Pericardis alive or Raisuli dead." Pericardis was released on the 24th of June of that year, and

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§ 578. Moneys received from foreign governments in trust for American citizens.—In the act of Congress of February 26, 1896, making appropriations for the diplomatic and consular service for the fiscal year ending June 30, 1897, the following provision is made for the disposition of trust funds: "Hereafter all moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the treasury. The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the Secre-

on the 27th of June the squadron departed from Tangiers. For. Rel. 1904, 496-504.

"Any person disturbing public tranquillity, or violating the sovereign rights of a nation, or its laws, offends the state, declares himself its enemy, and incurs just punishment. His responsibility is not less when, instead of attacking the state, the crimes or offenses of which he has been guilty menace personal safety or the rights and property of individuals. In both cases, the government would fail to perform its duty if it did not repress the injury committed and cause the offender to feel the weight of its penal legislation. The state is not only under obligations to secure the reign of peace and justice among the different members of the society whose organ it is; it must also see, and that most carefully, that all who are under its authority offend neither the government nor the citizens of other countries. Nations are obliged to respect one another, to abstain from offending or injuring each other in any way, and, in a word, from doing anything that can impair each other's interests and disturb the harmony which should govern their relations. A state that permits its immediate subjects or citizens to offend a foreign nation becomes a moral accomplice in their offenses and renders itself personally responsible.

"As regards its enforcement, this principle has nothing absolute, and admits of reservations inherent in the very nature of things; for there are private acts which the most vigilant authority cannot prevent, and which the wisest and most complete legislation cannot always hinder, or repress. All that other nations can ask of a government is that it shall show that it is influenced by a deep sense of justice and impartiality, and that it shall admonish its subjects by all the means in its power that it is their duty to respect their international obligations, that it shall not leave offenses into which they may have been led unpunished; and finally, that it shall act in all respects in good faith and in accordance with the precepts of natural law; to go beyond this would be raising a private injury to the magnitude of a public offense, and would be holding an entire nation responsible for a wrong done by one of its members." Calvo. Int. Law, sec. 1271.

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tary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due. Each of the trust funds covered into the treasury as aforesaid is hereby appropriated for the payment to the ascertained beneficiaries thereof of the certificates herein provided for."[54]

§ 579. **Payment of interest on claims.**—In the absence of an express statute, there is no obligation on the United States to pay interest on claims against it. If, acting through the Secretary of State, the government of the United States has unlawfully withheld money paid under an agreement of arbitration between the United States and a foreign country, a claim for such unlawful withholding against the Secretary of State is a claim against the government of the United States. Consequently, the government of the United States is not liable for interest on the money so withheld.[55] "It has been established as a general rule in the practice of the government," said Mr. Justice Blatchford, "that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief passed by Congress on special application. The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."[56]

Where it does not appear that the parties to a contract had some particular place in view, their contracts, so far as their nature, validity and interpretation are concerned, are to be controlled by the law of the place in which they are made. North Carolina, by the decisions of that state, where there is no statute on the subject, is not liable for interest, and although bonds of that state may be payable in New York, they do not bear interest and are not subject to the law of New York as to the payment of interest on such obligations.[57] "Interest," said Mr. Justice Gray,

[54] 29 U. S. Stats. at Large, 32.

[55] United States v. Bayard, 127 U. S. 251, 8 Sup. Ct. Rep. 1156, 32 L. ed. 159.

[56] United States v. Bayard, 127 U. S. 251, 8 Sup. Ct. Rep. 1156, 32 L. ed. 159.

[57] United States v. North Carolina, 136 U. S. 216, 10 Sup. Ct. Rep. 922, 34 L. ed. 336.

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"when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers."[58]

§ 580. Default not attributed to government.—Mr. Justice Strong said that whenever interest is allowed, "either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes."[59]

Where internal revenue taxes have been paid without protest, the allowance of interest has been denied.[60] In New York, interest was paid by the state to its canal fund for money borrowed from it under an agreement by its officers to pay such interest. This expense was incurred by the state in raising troops for the national defense, to be repaid to the state by the United States. The supreme court of the United States held that the interest was an expense properly incurred as a part of the "costs, charges, and expenses properly incurred" within the meaning of the act of Congress to be reimbursed to the state by the government of the United States. The decision was placed upon the ground that the state could not legally borrow from the canal fund without the payment of interest.[61] By the statute creating the court of claims, when the judgment appealed from is in favor of the claimant, and the same is affirmed by the supreme court, interest

[58] United States v. North Carolina, *supra*.

[59] United States v. Sherman, 98 U. S. 565, 25 L. ed. 235.

[60] Commissioners of Sinking Fund v. Buckner, 48 Fed. 542. See, also, United States v. Barber, 74 Fed. 484, 20 C. C. A. 616, 41 U. S. App. 424; Baxter v. United States, 51 Fed. 675, 2 C. C. A. 411; Walton v. United States, 61 Fed. 487; Bunton v. United States, 62 Fed. 172; United States v. Barber, 74 Fed. 484, 41 U. S. App. 424, 20 C. C. A. 616; Carr v. State, 127 Ind. 218, 22 Am. St. Rep. 624, 26 N. E. 783, 11 L. R. A. 375; Hawkins v. Mitchell, 34 Fla. 421, 16 South. 316; Seton v. Hoyt, 34 Or. 272, 75 Am. St. Rep. 643, 55 Pac. 968, 43 L. R. A. 635.

[61] United States v. State of New York, 160 U. S. 619, 16 Sup. Ct. Rep. 410, 40 L. ed. 551.

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is allowed on it at the rate of five per cent per year from the date of its presentation to the Secretary of the Treasury for payment, but no interest is allowed subsequent to the affirmance, unless it is presented to the Secretary of the Treasury.[62]

§ 581. Questions involving title to real estate.—The descent, alienation and transfer of land is controlled by the laws of the state in which the land is situated, as likewise the construction and effect of instruments by which its conveyance is affected.[63] The rule may be said to be universal "that every question involving title to real estate, whether by descent or purchase, must be determined by the law of the country wherein such real estate is situated, and all remedies for injuries in respect thereof must be pursued by the aggrieved party before the duly constituted tribunals of such country."[64]

Still, the United States held that a Mexican statute which discriminated against its citizens and other aliens relative to the capacity to hold real estate in Mexico, conflicted with the treaty then existing.[65] But it is to be observed that trespasses and evictions, when they may be characterized as a forcible deprivation without recourse to law, may become the subjects of diplomatic intervention.[66]

§ 582. Claims arising on contracts.—As a general proposition, the United States will not interfere, except by its good offices in the prosecution of claims based on contracts made with foreign governments.[67] But there may be cases where diplomacy is the

[62] U. S. Rev. Stats., sec. 1090.

[63] Brene v. Insurance Co., 96 U. S. 627, 24 L. ed. 858.

[64] Mr. Marcy, Secretary of State, to Mr. Selding, March 3, 1856, 45 MS. Dom. Let. 123.

[65] Mr. Evarts, Secretary of State, to Mr. Foster, June 23, 1879, MS. Inst. Mex. XXI.

[66] 2 Wharton's Int. Law Dig. 667, note.

[67] Mr. Olney, Secretary of State, to Mr. Meyer, Nov. 16, 1895, 206 MS. Dom. Let. 78; Mr. Day, Secretary of State, to Mr. Buchanan, Minister to Argentine Republic, No. 362, May 31, 1898, MS. Inst. Arg. Rep. XVII, 363; Mr. Day, Secretary of State, to Mr. Ketcham, July 28, 1898, 230 MS. Dom. Let. 414; Mr. Hay, Secretary of State, to Mr. Powell, Minister to Hayti, No. 338, April 12, 1899, MS. Inst. Hayti, IV, 143; Mr. Hay, Secretary of State, to Messrs. E. Becker & Co., April 12, 1899, 236 MS. Dom. Let. 298.

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only method by which redress can be obtained.[68] It has been frequently said that the government of the United States will insist on a fair and impartial examination and adjudication without discrimination as to nationality of a claim based on contract made by a citizen of the United States against another government. It is not required by the United States that rights which its citizens have forfeited should be maintained, but that they should not be arbitrarily deprived of those rights without a fair examination by an impartial tribunal.[69] It was claimed by an American citizen that the Russian government was using an invention made by him in its fortifications and vessels, and he sought the aid of the United States to obtain reimbursement from the government of Russia, but Mr. Fish, Secretary of State, held that the matter was not one which could properly be presented through diplomatic channels.[70] Governments have also frequently made reparation for false or irregular arrests,[71] but if the proceedings have been regular, indemnity is not demanded.[72]

§ 583. **The court of claims.**—The court of claims has jurisdiction of all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, and all claims that may be referred to it by either House of Congress.[73] But its jurisdiction, however, does not extend to any claim against the government not pending therein, on December 1, 1862, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.[74] A suit brought against the United States for the purpose of recovering an unsatisfied part of a judgment rendered in the Court of Commissioners of Alabama Claims, which the Secretary of the Treasury illegally withheld from the party entitled to it, is not a case growing out of and dependent on the treaty between the United States and Great Britain. The court of claims is not prohibited from taking jurisdiction of this claim, because the claimants are seeking to recover upon the specific

[68] Moore's Int. L. Dig. 717.
[69] 6 Moore's Int. L. Dig. 724.
[70] To Mr. Meyers, M. C., Jan. 27, 1875, 106 MS. Dom. Let. 311.
[71] See 6 Moore's Int. L. Dig. 767.
[72] 6 Moore's Int. L. Dig. 765.
[73] Rev. Stats., sec. 1059.
[74] Rev. Stats., sec. 1066.

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appropriation made by Congress and not upon any obligation created by the treaty itself. While it might be said that a claim of this nature in one sense is dependent upon the treaty, the dependence is too remote to be affected by the statute, which contemplates a direct connection between the treaty and the claim, to prevent the court of claims from having jurisdiction of it.[75] But if the petition bases the right to recovery on the provisions of the treaty itself, and no statute is invoked nor is it charged that the United States is directly and primarily liable on the claim, the court has no jurisdiction.[76]

As the jurisdiction of the court of claims is limited to claims against the United States, it has no jurisdiction of a claim against the District of Columbia which Congress referred to the court.[77] A state is competent to maintain a suit.[78] A claim for unliquidated damages on contract exists where the Secretary of War dispossessed a lessee who had a valid lease before the expiration of his term.[79] The law of the state where the cause of action arose or where the claim accrued is considered by the court in all cases where questions arise affecting the validity of contracts, the title to property, the distribution of estates, or the proper parties to prosecute a case.[80]

§ **584. Jurisdictional requirements.**—While it is a general rule that the courts of one state will not lend assistance to the officers of another to withdraw funds or property of a decedent, without making provision for local creditors, this rule does not require the treasurer of the United States, in paying the amount due to a claimant against the United States, to prefer his creditors residing in the District of Columbia over the receiver of personal property of such claimant appointed by a court of chancery of the

[75] United States v. Weld, 127 U. S. 51, 8 Sup. Ct. Rep. 1000, 32 L. ed. 62.

[76] Great Western Ins. Co. v. United States, 112 U. S. 193, 5 Sup. Ct. Rep. 99, 28 L. ed. 687; Alling v. United States, 114 U. S. 562, 5 Sup. Ct. Rep. 1080, 29 L. ed. 272. These cases are distinguished in United States v. Weld, 127 U. S. 51, 8 Sup. Ct. Rep. 1000, 32 L. ed. 62.

[77] Strachan v. District of Columbia, 20 Ct. of Cl. 484.

[78] Louisiana v. United States, 22 Ct. of Cl. 85.

[79] Dunbar v. United States, 22 Ct. of Cl. 109.

[80] Borcherling v. United States, 35 Ct. of Cl. 312; United States v. Borcherling, 185 U. S. 223, 22 Sup. Ct. Rep. 607, 46 L. ed. 884.

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state in which he lived and was served with process.[81] This court cannot establish a jurisdictional requirement, as Congress alone has the power to do this.[82] There is an implied contract on the part of the United States to pay for land appropriated to a public use, which is admitted to be private property.[83] But there is no implied contract to make compensation for the use and occupation of the land of a private citizen where it is taken by the United States under a claim that it is the property of the government.[84] Claims are barred within six years after they accrue.[85] Aliens may prosecute claims where their governments grant reciprocity, the state declaring that aliens "who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts shall have the privilege of prosecuting claims against the United States in the court of claims, whereof such

[81] United States v. Borcherling, 185 U. S. 223, 22 Sup. Ct. Rep. 607, 46 L. ed. 884.

[82] Clyde v. United States, 13 Wall. 38, 20 L. ed. 479.

[83] United States v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. Rep. 306, 28 L. ed. 846; Great Falls Mfg. Co. v. Attorney General, 124 U. S. 581, 8 Sup. Ct. Rep. 631, 31 L. ed. 527; Merriam v. United States, 29 Ct. of Cl. 250; Morris v. United States, 30 Ct. of Cl. 162; Dunnington v. United States, 24 Ct. of Cl. 404.

[84] Langford v. United States, 101 U. S. 341, 25 L. ed. 1010; Hill v. United States, 149 U. S. 593, 13 Sup. Ct. Rep. 1011, 37 L. ed. 862.

[85] Rev. Stats., sec. 1069. An action will lie to the court where an officer, clothed with authority to investigate and allow, determines the facts of the case and refers it to the court for a determination of the question presented, or where the officer has allowed the claim and transmitted it to the accounting officers for payment, and they or the Secretary of the Treasury refuse to give effect to the award. Kaufman's Case, 11 Ct. of Cl. 659; affirmed 96 U. S. 567, 24 L. ed. 792; Horton v. United States, 31 Ct. of Cl. 48; Brigg's Case, 15 Ct. of Cl. 48; Stotesburg v. United States, 23 Ct. of Cl. 285; Greencastle's Bank Case, 15 Ct. of Cl. 225; Nixon v. United States, 18 Ct. of Cl. 448; Sybrandt v. United States, 19 Ct. of Cl. 461; Real Estate Sav. Bank's Case, 16 Ct. of Cl. 335; affirmed 104 U. S. 728, 26 L. ed. 908; Dupasseur v. United States, 19 Ct. of Cl. 1; Ramsay v. United States, 21 Ct. of Cl. 443. This court has no jurisdiction where the claim presented is for a wrongful diversion of a watercourse. Mills v. United States, 46 Fed. 738, 12 L. R. A. 673. The court has no jurisdiction of a claim for the infringement of a patent. Pitcher's Case, 1 Ct. of Cl. 7; Schillinger v. United States, 155 U. S. 163, 15 Sup. Ct. Rep. 85, 39 L. ed. 108.

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court, by reason of their subject matter and character, might take jurisdiction."[86]

§ **585. The Bowman Act.**—In 1883 Congress passed an act commonly known as "The Bowman Act," which provides "that whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either House of Congress, which involves the investigation and determination of facts, the committee or House may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or to the House by which the case was transmitted for its consideration." Another section provides: "That when a claim or matter is pending in any of the executive departments which may involve controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court, and the same shall be proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the department by which it was transmitted for its guidance and action."[87]

§ **586. Liberal construction of act.**—This act is liberally construed, because it is a remedial act by which it is intended to relieve Congress and afford redress to the claimant.[88] Letters and *ex parte* statements are excluded.[89] There is, however, no jurisdiction in the court to determine a diplomatic claim presented by a foreign government to the Secretary of State, although it has been transmitted by him to the court.[90] The court does not enforce the strict rules of pleading, but pays attention to the substance; and the case will not be dismissed, if by reason-

[86] Rev. Stats., sec. 1068.

[87] 22 U. S. Stats. at Large, 485.

[88] Duplantier v. United States, 27 Ct. of Cl. 323.

[89] West Virginia v. United States, 37 Ct. of Cl. 205.

[90] Berger v. United States, 36 Ct. of Cl. 243.

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able intendment the purpose of Congress can be subserved by the finding of the court. On the contrary, the court will examine and report according to the requirements of the statute.[91] The act does not provide for an appeal to the supreme court, as no judgment is entered under its provisions.[92] The petition of claimant must set up substantially the same cause of action as that transmitted to the court, as the jurisdiction of a claim stated in a bill is confined to the claim which the bill describes.[93]

§ 587. **The Tucker Act.**—In 1887 an act was passed by Congress, commonly known as the Tucker Act, which was intended as an enlargement of the jurisdiction of the court of claims. It provided that this court should have jurisdiction to hear and determine "all claims founded upon the constitution of the United States, or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."[94] Under the provisions of this act the court of claims has power to reform a contract so as to carry into effect the intention of the parties.[95] The act, being remedial in its character, should receive a liberal construction.[96] A claimant cannot overcome the provision of the act, denying jurisdiction in cases sounding in tort, by waiving the tort, and suing as if on a contract, even where the common law would permit him to do so.[97]

[91] Cofer v. United States, 30 Ct. of Cl. 131.

[92] Webb v. United States, 20 Ct. of Cl. 496.

[93] Choctaw Nation v. United States, 19 Ct. of Cl. 250.

[94] 24 U. S. Stats. at Large, 505. It is provided that nothing "shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by a court, department, or commission authorized to hear and determine the same."

[95] South Boston Iron Works v. United States, 34 Ct. of Cl. 174.

[96] Southern Pac. R. Co. v. United States, 38 Fed. 55.

[97] McArthur v. United States, 29 Ct. of Cl. 194.

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The words "claims founded upon the Constitution of the United States," confer jurisdiction of as comprehensive and untrammeled character, as the legislative power could well make.[98] It is not necessary, under this act, to make a demand on an executive department before commencing suit.[99] If a petition is filed for equitable relief, it should be reasonably definite and certain in its statements of facts.[100] A claim does not sound in tort, where an agent who has authority to contract for the government interferes in an improper manner with the completion of a contract made with such agent. The contractor in such a case is, under this act, entitled to recover.[101]

§ 588. **Concurrent jurisdiction of district and circuit courts.**—The "Tucker Act" provides that "the district courts of the United States shall have concurrent jurisdiction with the court of claims, as to all matters named in the preceding section, where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All cases brought and tried under the provisions of this act shall be tried without a jury."[102] By an amendment made on June 27, 1898, it is provided that the jurisdiction conferred upon the district and circuit courts "shall not extend to cases brought to recover fees, salary or compensation for official services of officers of the United States, or brought for such purpose by persons

[98] Stovall v. United States, 26 Ct. of Cl. 240.

[99] Kendall's Case, 14 Ct. of Cl. 122; affirmed 107 U. S. 123, 2 Sup. Ct. Rep. 277, 27 L. ed. 437; Carlisle v. United States, 29 Ct. of Cl. 414; Battelle's Case, 7 Ct. of Cl. 297; Cotton v. United States, 29 Ct. of Cl. 207; Spann v. United States, 21 Ct. of Cl. 267; Bulkley's Case, 8 Ct. of Cl. 519; Leonard v. United States, 18 Ct. of Cl. 382; United States v. Knox, 128 U. S. 230, 9 Sup. Ct. Rep. 63, 32 L. ed. 465; Ravesies v. United States, 21 Ct. of Cl. 243; Bryan v. United States, 21 Ct. of Cl. 249; United States v. Fitch, 70 Fed. 578, 17 C. C. A. 233; United States v. Ewing, 140 U. S. 142, 11 Sup. Ct. Rep. 743, 35 L. ed. 388; United States v. Fletcher, 47 U. S. 664, 13 Sup. Ct. Rep. 434, 37 L. ed. 322.

[100] Schierling v. United States, 23 Ct. of Cl. 361.

[101] Bowe v. United States, 42 Fed. 761.

[102] 24 U. S. Stats. at Large, 505. sec. 2.

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claiming as such officers or as assignees or legal representatives thereof."[103] Letter carriers in the postal service are within the meaning of this amendment. "Letter carriers are appointed by the postmaster-general under authority of the acts of Congress, practically during good behavior. They are sworn and give bond for the faithful performance of their duties. They are paid from moneys appropriated for the purpose by Congress, and their salaries are fixed by law. They have regularly prescribed services to perform, and their duties are continuing and permanent, not occasional or temporary."[104] The constitution of the United States is not violated by the provision for trial by the court without a jury.[105]

§ 589. **Procedure under this act.**—In proceeding under this act the plaintiff is required to file a petition, "duly verified, with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law."[106] The plaintiff is required to serve a copy of his petition upon the district attorney of the United States, in the district in which suit is brought, and to mail a copy by registered letter to the attorney general of the United States, and to cause to be filed with the clerk of the court in which the suit is instituted an affidavit of such service and of the mailing of such letter. It is made the duty of the district attorney upon whom service is made to appear and defend the interests of the government, and within sixty days after the service, unless the time should be extended by order of the court, to file a plea, answer, or demurrer, on the part of the government, and to file a notice of any counterclaim, setoff, claim for damages, or other demand, or defense of the government. If the district attorney should fail so to act, the plaintiff may pro-

[103] 30 U. S. Stats. at Large, 495.

[104] United States v. McCrory, 91 Fed. 295, 33 C. C. A. 515.

[105] McElrath v. United States, 102 U. S. 426, 26 L. ed. 189; United States v. Saunders, 79 Fed. 407, 24 C. C. A. 649.

[106] 24 U. S. Stats. at Large, 506.

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ceed with the case under such rules as may be adopted by the court, but the plaintiff is not permitted to have judgment for his claim or any part of it, unless he shall establish the same by satisfactory proof.[107] The form of the petition is immaterial, and a demurrer to it should not be sustained if facts are set forth from which a contract may be implied, or if it states lawful and authorized acts of the government, not amounting to torts of its agents, upon which there may be sustained an obligation to pay damages.[108]

§ 590. **Judgments and appeals.**—It is the duty of the court to cause a written opinion to be filed, setting forth its specific findings of facts and conclusions of law, and to render judgment accordingly. "If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts."[109] The findings of facts are equivalent to the verdict of a jury.[110] If the facts are not in dispute, and if it appear from the pleadings, exhibits and opinion that the judgment of the court is justified, separate findings of facts and conclusions of law are not indispensable.[111] A judgment against the United States will be reversed if the findings are obscure and incomplete.[112] No person is excluded as a witness because he is a party or interested, and either party to the suit has the same rights of appeal or writ of error as are reserved in the statutes of the United States, and upon the same conditions and limitations. The mode of procedure in claiming and perfecting an appeal or writ of error is required to conform in all respects, as near as may be, to the statutes and rules of court governing appeals and writs of error in like cases.[113] Where the record or the opinion of the lower court shows that the judgment was rendered for the purpose of submitting the question on appeal, and against the convictions of the court, a *pro forma* judgment rendered against the United

[107] 24 U. S. Stats. at Large, 506.

[108] Chappel v. United States, 34 Fed. 673.

[109] 24 U. S. Stats. at Large, 506.

[110] Stone v. United States, 164 U. S. 380, 17 Sup. Ct. Rep. 71, 41 L.

[111] United States v. Tinsley, 68 Fed. 433, 15 C. C. A. 507.

[112] United States v. Kelly, 89 Fed. 946, 32 C. C. A. 441.

[113] 24 U. S. Stats. at Large, 506. 507.

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States by the court of claims will be reversed.[114] The inquiry is limited to the question whether the judgment is supported by specific findings required by the act.[115]

[114] United States v. Gleeson, 124 U. S. 255, 8 Sup. Ct. Rep. 502, 31 L. ed. 421. See as to appeals, United States v. Davis, 131 U. S. 39, 9 Sup. Ct. Rep. 657, 33 L. ed. 93; United States v. Yukers, 60 Fed. 641, 9 C. C. A. 171; United States v. Davis, 131 U. S. 36, 9 Sup. Ct. Rep. 657, 33 L. ed. 93; United States v. Harsha, 172 U. S. 567, 19 Sup. Ct. Rep. 294, 43 L. ed. 556; Chase v. United States, 155 U. S. 489, 15 Sup. Ct. Rep. 174, 39 L. ed. 234.

[115] Chase v. United States, 155 U. S. 500, 15 Sup. Ct. Rep. 174, 39 L. ed. 234.

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APPENDIX I.

EXTRADITION.

The following regulations have been adopted by the Department of State concerning the extradition of fugitives from justice:

MEMORANDUM RELATIVE TO THE EXTRADITION OF FUGITIVES FROM THE UNITED STATES IN BRITISH JURISDICTION.

Department of State,
Washington, May, 1890.

Where application is made for a requisition for the surrender of a fugitive from the justice of the United States in British jurisdiction, it must be made to appear—

1. That one of the offenses enumerated in the treaties between the United States and Great Britain has been committed within the jurisdiction of the United States or of some one of the States or Territories.

2. That the person charged with the offense has sought an asylum or been found within the British dominions.

All applications for requisitions should be addressed to the Secretary of State, and forwarded to the Department of State, accompanied with the necessary papers, as herein stated, and must furnish the full name of the person proposed for designation by the President to receive the prisoner and convey him to the United States. When the offense is within the jurisdiction of the State courts, the application must come from the governor of the State. When the offense is against the United States, the application must come from the Attorney-General or the proper executive department.

It is stipulated in the treaties with Great Britain that extradition shall be granted only on such evidence of criminality as, according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed.

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It is admissible as constituting such evidence to produce a properly certified copy of an indictment found against the fugitive by a grand jury or of any information made before an examining magistrate, accompanied by one or more depositions setting forth as fully as possible the circumstances of the crime. An indictment alone has been held to be insufficient.

By the fourteenth section of the English extradition act of 1870. "depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of, or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence of proceedings under this act."

The fifteenth section of the same act provides as follows: "Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of, or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this act if authenticated in manner provided for the time being by law, or authenticated as follows: (1) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued; (2) if the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require; and (3) if the certificate of, or judicial documents stating the fact of conviction purport to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice, or some other minister of state; and all courts of justice, justices and magistrates, shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof."

If the fugitive be charged with the violation of a law of a State or Territory, his delivery will be required to be made to the authorities of such State or Territory.

If the offense charged be a violation of a law of the United States (such as piracy, murder on board of vessels of the United

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States, or in arsenals or dockyards, etc.), the delivery will be required to be made to the officers or authorities of the United States.

Where the requisition is made for an offense against the laws of a State or Territory, the expenses attending the apprehension and delivery of the fugitive must be borne by such State or Territory. Expenses of extradition are defrayed by the United States only where the offense is against its own laws.

PROVISIONAL ARREST.

Applications, both by telegraph and by letter, are frequently made to this Department for its intervention to obtain the arrest and provisional detention of fugitives from justice in England, Scotland, or Ireland in advance of the presentation of the formal proofs upon which a demand for their extradition may be based. In such cases the only manner in which the Department can intervene is by informing the ambassador of the United States in London of the facts and instructing him to take the necessary measures. This the ambassador does by authorizing some one connected with the embassy to make complaint on oath before a magistrate, in accordance with the requirements of the British extradition act of 1870. The form of this complaint is hereto annexed as appendix 2. Attention is invited to its provisions, and especially to the statement deponent is required to make that he is informed and believes that a warrant has been issued in the foreign country for the arrest of the accused. This Department, when requested to intervene in such a case, should always be enabled to inform the ambassador that such a warrant has been issued, in order that the complaint before the British magistrate may be made in due form and without delay.

APPENDIX 1.

The tenth article of the treaty between the United States and Great Britain, concluded August 9, 1842, provides for the surrender of criminals for (1) murder, (2) assault with intent to commit murder, (3) piracy, (4) arson, (5) robbery, (6) forgery, (7) the utterance of forged paper.

The convention concluded July 29, 1889, provides for extradition for the following additional offenses:

1. Manslaughter, when voluntary.

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2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled. stolen, or fraudulently obtained.

4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

5. Perjury, or subornation of perjury.

6. Rape; abduction; child-stealing; kidnapping.

7. Burglary; house-breaking or shop-breaking.

8. Piracy by the law of nations.

9. Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid tenth article, provided such participation be punishable by the laws of both countries.

By the seventh article of the convention of 1889, it is stipulated as follows:

"The provisions of the said tenth article (of the treaty of 1842) and of this convention shall apply to persons convicted of the crimes therein respectively named and specified whose sentence therefor shall not have been executed."

The eighth article of the convention of 1889 is as follows: "The present convention shall not apply to any of the crimes herein specified which shall have been committed, or to any conviction which shall have been pronounced, prior to the date at which the convention shall come into force."

The ninth article provides that the convention "shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the high contracting parties." The convention was proclaimed both in the United States and in Great Britain March 25, 1890, and thus came into force in both countries April 4, 1890.

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APPENDIX 2.

(*Form of information used in obtaining provisional warrants of arrest in the United Kingdom of Great Britain and Ireland.*)

Metropolitan Police District, to wit.

The information of ————, of ————, taken on oath this —— day of ————, in the year of our Lord one thousand eight hundred and ——, at the Bow Street Police Court, in the county of Middlesex, and within the Metropolitan police district, before me, the undersigned, one of the magistrates of the police courts of the metropolis, sitting at the police court aforesaid, who saith that ————, late of ————, is accused [or convicted] of the commission of the crime of ————, within the jurisdiction of ————, and now suspected of being in the United Kingdom. I make this application on behalf of the ———— Government.

I produce ————.

I am informed and verily believe that a warrant ——— has been issued in ——— for the arrest of the accused; that the said Government will demand h— extradition in due course, and that there are reasonable grounds for supposing the accused may escape during the time necessary to present the diplomatic requisition for h— surrender, and I therefore pray that a provisional warrant may issue under the provisions of 33 and 34 V., c. 52, s. 8.

Sworn before me, the day and year first above mentioned, at the police court aforesaid.

CERTIFICATE.

I, ————, Governor of ————, do hereby certify that the accompanying application presented by me on behalf of the ———— of ————, for the extradition of ————, from ————, is made solely for the purpose of securing his trial and punishment for the offense of ————, and not in order to enforce the collection of a debt, or to avoid the penalty of a bail bond, or for any private purpose whatever, and that if the application be granted the criminal proceedings shall not be used for any of said purposes.

————,

Governor of ————.

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PROVISIONAL DETENTION OF FUGITIVES FROM JUSTICE IN GREAT BRITAIN.

Department of State,

Washington, D. C., March 17, 1891.

The minister of the United States in London informs the Department that inquiries are frequently made at the legation by officers of the London police who have received telegrams from police authorities or detective agencies in the United States asking for the arrest and detention of alleged fugitives from justice.

In Great Britain a provisional warrant of arrest of a fugitive from justice may be obtained from a judicial magistrate, but it is required that the application for the warrant shall have the sanction of the foreign government. When, therefore, the London police receive such a telegram as has been described, they at once apply to the minister of the United States to ascertain whether he will authorize proceedings before a magistrate to be taken.

Ministers of the United States are not authorized to request or to sanction requests for the arrest of fugitives from justice without the instructions of this Department. When, therefore, the minister of the United States in London is asked to sanction a complaint before a magistrate, based upon a request made by police authorities or detective agencies in this country, he is obliged to refuse.

The proper course in such a case is for the authorities of the particular district in which the offense was committed to apply to the governor of the State in which such district is situated, through whom the application for the intervention of the United States or of its representatives must come. The only exception to this rule is the city and county of New York, the prosecuting attorney of which is permitted to apply for provisional detention directly to this Department, although the formal application for a requisition for surrender must come through the governor of the State.

In applying to this Department to secure the provisional detention of a fugitive in Great Britain, the charge of crime must be briefly and clearly stated, and, unless there is some witness in Great Britain to identify the fugitive, a description of him should be furnished either to this Department or to the London police. A positive assurance must also be given to this Department that a

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warrant has been issued for his arrest at the place where the crime was committed. This is a necessary allegation under the British statute.

MEMORANDUM RELATIVE TO APPLICATIONS FOR THE EXTRADITION FROM FOREIGN COUNTRIES OF FUGITIVES FROM JUSTICE.

Department of State,

Washington, October, 1892.

Extradition will be asked only from a government with which the United States has an extradition treaty, and only for an offense specified in the treaty.

All applications for requisitions should be addressed to the Secretary of State, accompanied by the necessary papers as herein stated.* When extradition is sought for an offense within the jurisdiction of the State or Territorial courts, the application must come from the governor of the State or Territory. When the offense is against the United States, the application should come from the Attorney-General.

In every application for a requisition it must be made to appear that one of the offenses enumerated in the extradition treaty between the United States and the government from which extradition is sought has been committed within the jurisdiction of the United States, or of some one of the States or Territories, and that the person charged therewith is believed to have sought an asylum or has been found within the dominions of such foreign government.

The extradition treaties of the United States ordinarily provide that the surrender of a fugitive shall be granted only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her commitment for trial if the crime or offense had been there committed.

If the person whose extradition is desired has been convicted of a crime or offense and escaped thereafter, a duly authenticated

*The only exception is found in the treaty with Mexico, under which, in the case of crimes committed in the frontier States or Territories, requisitions may be made directly by the proper authorities of the State or Territory. (Article 2, treaty with Mexico, concluded December 11, 1861.)

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copy of the record of conviction and sentence of the court is ordinarily sufficient.

If the fugitive has not been convicted, but is merely charged with crime, a duly authenticated copy of the indictment or information, if any, and of the warrant of arrest and return thereto, accompanied by a copy of the evidence upon which the indictment was found, or the warrant of arrest issued, or by original depositions setting forth as fully as possible the circumstances of the crime, are usually necessary. Many of our treaties require the production of a duly authenticated copy of the warrant of arrest in this country; but an indictment, information, or warrant of arrest alone, without the accompanying proofs, is not ordinarily sufficient. It is desirable to make out as strong a case as possible, in order to meet the contingencies of the local requirements at the place of arrest.

If the extradition of the fugitive is sought for several offenses, copies of the several convictions, indictments, or informations and of the documents in support of each should be furnished.

Application for the extradition of a fugitive should state his full name, if known, and his alias, if any, the offense or offenses in the language of the treaty upon which his extradition is desired, and the full name of the person proposed for designation by the President to receive and convey the prisoner to the United States.

As the application proper is desired solely by the Department as a basis for its action, and is retained by it, it is not necessary that it should be attached to the evidence.

Copies of the record of conviction, or of the indictment, or information, and of the warrant of arrest, and the other papers and documents going to make up the evidence are required by the Department, in the first instance, as a basis for requesting the surrender of the fugitive, but chiefly in order that they may be duly authenticated under the seal of the Department, so as to make them receivable as evidence where the fugitive is arrested upon the question of his surrender.

Copies of all papers going to make up the evidence, transmitted as herein required, including the record of conviction, or the indictment, or information, and the warrant of arrest, must be duly certified and then authenticated under the great seal of the State making the application or the seal of the Department of Justice, as the case may be; and this Department will authenticate

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the seal of the State or of the Department of Justice. For example, if a deposition is made before a justice of the peace, the official character of the justice and his authority to administer oaths should be attested by the county clerk or other superior certifying officer; the certificate of the county clerk should be authenticated by the governor or secretary of state under the seal of the State, and the latter will be authenticated by this Department. If there is but one authentication, it should plainly cover all the papers attached.

All of the papers herein required in the way of evidence must be transmitted in duplicate, one copy to be retained in the files of the Department, and the other, duly authenticated by the Secretary of State, will be returned with the President's warrant, for the use of the agent who may be designated to receive the fugitive. As the governor of the State, or the Department of Justice, also ordinarily requires a copy, *prosecuting attorneys should have all papers made in triplicate.*

By the practice of some of the countries with which the United States has treaties, in order to entitle copies of depositions to be received in evidence the party producing them is required to declare under oath that they are true copies of the original depositions. It is desirable, therefore, that such agent, either from a comparison of the copies with the originals or from having been present at the attestations of the copies, should be prepared to make such declaration. When the original depositions are forwarded, such declaration is not required.

Applications by telegraph or letter are frequently made to this Department for its intervention to obtain the provisional arrest and detention of fugitives in foreign countries in advance of the presentation of the formal proofs upon which a demand for their extradition may be based. Such applications should state specifically the name of the fugitive, the offense with which he is charged, the circumstances of the crime as fully as possible, and a description and identification of the accused. It is always helpful to show that an indictment has been found or a warrant of arrest has been issued for the apprehension of the accused. In Great Britain the practice makes it essential that it shall appear that a warrant of arrest has been issued in this country.*

*For fuller information with respect to procedure in cases of provisional arrest within British jurisdiction, see Department's memorandum of May, 1890.

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Care should be taken to observe the provisions of the particular treaty under which extradition is sought, and to comply with any special provisions contained therein. The extradition treaties of the United States may be found in the several volumes of the Statutes at Large, in the "Revised Statutes of the United States relating to the District of Columbia and Post Roads, together with Public Treaties in force on the 1st day of December, 1873," and in the volume of Public Treaties, 1887. Copies of particular treaties will be furnished by the Department upon application.

If the offense charged be a violation of a law of a State or Territory, the agent authorized by the President to receive the fugitive will be required to deliver him to the authorities of such State or Territory. If the offense charged be a violation of a law of the United States, the agent will be required to deliver the fugitive to the proper authorities of the United States for the judicial district having jurisdiction of the offense.

Where the requisition is made for an offense against the laws of a State or Territory, the expenses attending the apprehension and delivery of the fugitive must be borne by such State or Territory. Expenses of extradition are defrayed by the United States only when the offense is against its own laws.

A strict compliance with these requirements may save much delay and expense to the party seeking the extradition of a fugitive criminal.

Department of State,
Washington, March 26, 1900.

His Excellency
The Governor of ————,
————————.

Sir: The extradition from Mexico of fugitives from the justice of the United States has been the subject of more or less misunderstanding between the two Governments; and the recent failure of the Mexican Government to surrender, at the request of the governor of Texas, Leonardo Gonzales, accused of murder in that State, gave occasion for the careful study and consideration of the question between the Mexican Ambassador and the Department of State.

It appears that the failure to grant the extradition requested in some cases—and especially in the Gonzales case—was due, not to any motive of the Mexican Government to refuse the request on

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the ground of the Mexican citizenship of the accused, but because the demanding authorities had not sufficiently complied with section 1 of Article III of the treaty.

The proceedings in the Gonzales case may be taken as illustrative of alleged defects in the observance of necessary formalities, and for that reason a memorandum of the case is enclosed herewith, marked A.

With a view to arriving at a more distinct understanding of the requirements and formalities which, under the treaty, are required of the United States authorities in such cases, and the observance of which will facilitate the extradition of accused persons, the Department addressed a note, under date of January 12 ultimo, to the Mexican Ambassador (copy enclosed, marked B), inviting a conference on the subject.

At the conference the Ambassador explained the laws of the Mexican Republic bearing on the question, and stated that the laws of its several States are substantially the same as those of the Mexican Federal Government. He afterwards furnished the Department a memorandum of the conference (copy enclosed, marked C), and also a copy in Spanish and English of the said provisions of the Mexican code (copy enclosed, marked D). The observance of the precepts of the said laws on the part of the demanding authorities will, it is believed, lead to satisfactory results in the future.

It may be further observed that within the experience of the Department, the corresponding requirements of our laws on the Mexican Government in such cases have been by it scrupulously pursued in those cases where extradition has been sought by it through the diplomatic channels.

I also enclose printed leaflet copy of the extradition treaty in force between the two Governments.

I have the honor to be, Sir,

Your obedient servant,

JOHN HAY.

Enclosures:

Memorandum on Gonzales case.
To Mexican Ambassador, No. 64, January 12, 1900.
Conference with Mexican Ambassador.
Copy of certain articles of Mexican code.
Extradition treaty between the United States and Mexico.

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A

Memorandum on the Gonzales case.

It appears from Mr. Clayton's Despatch No. 415, November 22 ultimo, and in Governor Sayers' letter of November 28 ultimo, with their enclosures, that the request for the extradition of Leonardo Gonzales was based upon the affidavit charging him with the crime of murder of Prisciliana Laura, and upon a deposition of H. C. Crosby. It appears that extradition was refused by the Mexican Government on the ground that the demand was founded upon the warrant issued by the clerk of Pecos County and on said deposition, and that there was no evidence submitted to show legally the existence of the corpus delicti of homicide; that no evidence of the dead body was given by competent authority, nor that an authoritative examination was made of the wounds inflicted upon Prisciliana Laura, nor that an autopsy was held upon the dead body to prove the cause of death, indispensable requisites for the imposition of punishment according to articles 544, 545, and 546 of the Mexican penal code; and that the deposition of said Crosby failed to state expressly the place or town of Pecos County where the homicide was committed, and was wanting in other circumstances to raise the presumption of guilt against Gonzales. A further ground of refusal was the want of sufficient authentication of the extradition proceedings had in Texas as required by Article VIII and IX of the treaty and because the Mexican authorities were not competent to take jurisdiction of the case for lack of certain requisites enumerated in article 186 of the penal code in force in Coahuila and in the Federal District; that under the treaty, extradition cannot be granted where the proof of crime presented by the requesting party would not justify the apprehension and the putting on trial of the accused if the crime had been there committed.

B

The Secretary of State to the Mexican Ambassador.

No. 64.] Department of State,
Washington, January 12, 1900.

Excellency: Referring to your memorandum in relation to the provisional detention in the United States, under the extradition

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treaty, of fugitives from justice from Mexico, I should be pleased if you would call at the Department at your convenience, in order that we may confer upon the subject.

I should be glad to consider with you at the same time the question of the surrender, under Article IV of the treaty, of the citizens of the country from which the surrender is requested for crimes committed in the other. The President of the United States, in the exercise of his discretion, recently permitted the extradition of Mrs. Mattie Rich, a citizen of the United States, at the request of Mexico; while, on the other hand, President Diaz recently refused to permit the surrender of Leonardo Gonzales. Inasmuch as the request was made in this case by the governor of Texas on the governor of Coahuila, the papers and evidence in the case did not pass through the Department of State, and it refrains from expressing any opinion on the question whether there was, as decided by the Mexican Government, an entire want of proof of the corpus delicti, without which extradition would properly be refused in any case. But there was apparently another ground of the decision of the Mexican Government which, if correctly understood by the Department and rigidly adhered to in the future, would endanger the successful operation of this clause of the treaty. It seems to be implied in said decision that it is, under the laws of Mexico, an indispensable prerequisite to the arrest and commitment for trial of anyone accused of murder that there be technical proof of the crime by a coroner's inquest and by an autopsy, so that the fact of death must be established by evidence of officials charged with the duty of holding such inquest and the cause of it established by scientific evidence of physicians holding the autopsy. Under the laws of the United States the fact of death, as well as the cause of it, must be proved in order to warant conviction; but no particular form of proof is necessary for the purpose of arrest and commitment for trial, it being necessary only to show prima facie or probable cause. Nor are those formal and technical proofs indispensable to conviction. It not unfrequently happens, in cases of murder, that the guilt of the accused can only be shown by circumstantial evidence, and no particular species of evidence is formally prescribed as indispensable to conviction. There is only one indispensable prerequisite, namely, the evidence must show the crime and the guilt of the accused beyond reasonable doubt.

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One government can hardly be expected to surrender its citizens on substantial proof of guilt, if the other government refuses to do so simply for want of technical proof.

It is hoped that the conference suggested may result in a mutually satisfactory understanding of the two Governments as to the working of Articles VIII and X and of Article IV of the treaty.

Accept, etc.

JOHN HAY.

C

Report of a conference between the Mexican Ambassador and the Solicitor for the Department of State.

At 10 o'clock a. m. on the 25th of January, 1900, the Mexican Ambassador appeared at the office of Mr. William L. Penfield, Solicitor for the Department of State, for the purpose of holding with him a conference, which His Excellency John Hay deemed expedient in order to agree on certain fixed rules that might facilitate the practical application of some articles of the extradition treaty in force between Mexico and the United States, owing to certain differences of opinion between the two contracting parties which had arisen in recent extradition cases presented by the former and the latter nation, respectively.

The conference having commenced and the points of discussion having been determined, the same being comprised in Article IV, paragraph 3 of Article VIII, and Article X of the treaty, Mr. Penfield expressed the desire to know whether in all cases of homicide it was necessary, in conformity with the laws of Mexico, in order to proceed with the arrest and commitment for trial of a defendant, to establish the existence of the corpus delicti by means of technical proof of the crime, as might be inferred from the decision rendered by the Mexican Government on November 15, 1899, when it denied the demand for the extradition of Leonardo Gonzales; whether such proof can be substituted by other proof, when it is impossible or difficult to obtain expert testimony; and whether if the extradition, once denied through lack of proof, might be granted afterwards upon presentation of perfected proof. He made reference to said Gonzales case and remarked that although the proofs submitted when that extradition was demanded might be considered insufficient, later on other proofs had been

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adduced, consisting of the testimony of eyewitnesses, which strengthened the first proof submitted; and he stated that the impression the people and some State officer of Texas had with reference to said decision was to the effect that the fact that Leonardo Gonzales was a Mexican had had a great deal to do in the way such decision was rendered, although the United States Government had delivered up Mattie Rich, an American citizen, to the Mexican authorities, thereby establishing a precedent which he hoped would be followed by the latter.

Mr. Azpíroz replied in the following terms:

"The extradition of Leonardo Gonzales was refused solely on the ground that no sufficient proofs had been presented as to the existence of the corpus delicti to the Mexican Government. It does not appear that the fact that the defendant was a Mexican citizen had, directly or indirectly, any influence in the decision.

"It is to be presumed that the Mexican Government would have been willing to grant the extradition by availing itself of the discretional power that the treaty between Mexico and the United States of February 22, 1899, gives to both of the high contracting parties to deliver up its own citizens, had the existence of the corpus delicti of the homicide charged to Gonzales been proved, in view of the desire it has to put into practical operation the ends that both Governments had contemplated when they entered into that treaty, and of the example recently given by the United States when it delivered up Mattie Rich. The Mexican Government, however, was not able to follow this precedent in the Gonzales case, because the facts in the latter case were different from those in the former, and had, of course, to lead to different results. As a matter of fact, the corpus delicti in the case of Mrs. Rich had been proved in conformity with the laws of Texas, and the only thing left for the discretionary decision of this Government was whether it should or should not surrender her, owing to her citizenship; whilst in the case of Gonzales there was wanting sufficient proof of the corpus delicti, which was indispensable for his arrest and commitment for trial, in the supposition that the crime imputed to him had been committed in Mexico, since the treaty itself, in its Article III, paragraph 1, prohibits the delivery of the accused in such a case.

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"The proof of the guilt of Leonardo Gonzales, in order to justify his arrest and commitment for trial, had to conform to the laws of the State of Coahuila, where the defendant was found, and to to the federal law on extradition approved May 19, 1897, which should be complied with in everything not otherwise provided for by the treaty. According to the code of penal procedure of Coahuila [a copy of the articles relative to the matter under discussion, together with an English translation, having been delivered by Mr. Azpíroz to Mr. Penfield], which is substantially on this point the same as the laws of criminal procedure in force in the other States, in the Federal District, in the Territories of the Mexican Union, 'the basis for a criminal proceeding is the proof of the existence of an act or that of an omission, which the law considers to be a delict; without such proof no further proceedings can be had.'

"In cases of homicide proof must be presented of the fact that one person had been killed by another, and furthermore there must be proof that some individual has been the real or at least the suspected slayer, so that he may be arrested and committed for trial for that crime.

"The law indeed requires, in order that there may be sufficient proof of the corpus delicti, that an autopsy of the corpse may be had, if that is possible; but if it could not be done, secondary proof may be produced, although even then the law requires that such proof may be passed upon by experts; and it is only when it is absolutely impossible to obtain the opinion of experts that it requires that such proof may be substituted by the testimony of witnesses who may have seen the corpse and the hurts, or that in some other way may know the facts regarding the crime, stating the circumstances which are indispensable to produce the certainty, or a great probability, that a homicide has been committed, and at least a suspicion as to who may have caused it.

"In fine, the documents that must be furnished with the requisition (for extradition) must prove the existence of the corpus delicti and furnish evidence of the identity and at least presumptions of the guilt of the person whose extradition is demanded, in such a manner that his arrest and prosecution might be ordered, in conformity with the laws of the Republic, had he committed the offense within its territory.

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"Since the local law establishes the testimony of experts as direct evidence, and that of simple witnesses as secondary, it is evident that secondary evidence is not sufficient until it is shown in some way that it was impossible to obtain direct evidence.

"The foregoing prescriptions of Mexican law in criminal procedure are substantially in accord with the common law that generally is enforced by the courts of the United States of America.

"It happens very often that the place where the corpse should be found is not known, when such corpse has been destroyed or its exhumation is unpracticable, or there is no surgeon to make the autopsy; but it is scarcely to be supposed that there could be any place in the United States where no physician, or at least a practitioner without diploma, might be found. Nevertheless, the laws of Mexico even provide for such a remote case, and lay down easy and reasonable rules for the substitution of expert testimony. Whenever these prescriptions are complied with, as well as the other requisites established in the treaty with the United States for the extradition of fugitives from justice of this country, the Mexican authorities who are required under said treaty to decide extradition cases will give their decisions bona fide, guiding themselves by the desire to facilitate the trial of criminals by competent courts, the fact that the accused is a Mexican citizen not being sufficient inducement to make them deviate from that purpose."

The Ambassador added:

"I find no legal objection against the presentation of the demand for extradition of a defendant a second time, if the proof that should accompany it, and owing to whose deficiency it was rejected, is perfected. In the special case of Leonardo Gonzales other testimony was added to that which accompanied the demand for extradition, but only after such demand had been denied, so that the Mexican Government did not even have the opportunity to know it when it rendered its decision."

Mr. Penfield inquired whether the Mexican Government would grant the extradition of Gonzales upon presentation of the new testimony which served to fortify that formerly given, in case that it should be sent with a new demand from the governor of Texas.

The Ambassador answered that in his personal opinion, formed upon examination of the case, the new proof would not be consid-

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ered satisfactory. "It is not yet," he added, "the proof required under the laws of Coahuila, nor has it been shown that it had been impossible to produce such a proof. It is a matter to strongly arouse our attention that the new proof, which is supposed to have existed at the same time as the facts to be proved thereby, had been omitted when the demand was made, should have been substituted by another of even less value, and should not have been presented during the time taken for the proceedings had to arrive at a decision of the case, which proceedings lasted very nearly four months; notwithstanding the fact that it should have been ready and that it was deemed decisive of the case, and that when the additional proof was sent to Mexico so inopportunely no explanation was given as to the delay occurring in its transmission. Furthermore, it should be said that the testimony consists of the depositions of two children, one 14 and the other 12 years of age, which are considered as among the weakest testimony that can be presented in conformity with the law."

Regarding the "authenticated copy of the law of the demanding party, which defines the crime and establishes its punishment," that is required under the third paragraph of Article VIII of the treaty, the Ambassador agreed with Mr. Penfield that said requisite had been prescribed in extradition cases only for crimes specified in sections 19 and 21 of Article II of the treaty.

Finally, they both were of the opinion that Article I devolves the surrender of the accused to each one of the contracting Governments, respectively; that Article VIII prescribes that the demands made in conformity thereto should be presented by the diplomatic agents, and that only in their absence by the superior consular officers of each one of the contracting parties, or in the cases mentioned in Article IX, by the first civil, military, or judicial authority of the proper frontier State or Territory, and that in conformity with those prescriptions Article X requires that the diplomatic channel should be resorted to in order to obtain the provisional arrest of the accused and his safe custody, while the demand for his extradition is completed, and that each of the contracting Governments are required to endeavor to render efficient these precautionary measures; or in other words, that all demands in extradition cases should be addressed by one of the two contracting Governments to the other through the channel of its respective

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diplomatic agent, excepting in the cases specified in the first paragraph of Article VIII and in Article IX of the treaty.

Mr. Penfield asked Mr. Azpíroz to prepare a draft containing instructions for the governors of the frontier States and Territory of this Republic in such way as suitably to facilitate their compliance with the provisions of Mexican law in each case, in order that he might submit such draft to the Secretary of State, whereby the rules that should be adopted might be laid down, as the result of an agreement, which could bear the form of a simple exchange of notes, or any other form that might be deemed expedient.

Mr. Azpíroz promised to prepare the draft mentioned and to send it to Mr. Penfield.

Thereupon the conference closed, both parties thereto showing themselves satisfied over its results.

D

[Translation.]

Artículos del Código de Procedimientos penales del Estado de Coahuila relativos á la comprobación del cuerpo del delito.

ART. 133. La base del procedimiento criminal es la comprobación de la existencia de un hecho ó la de una omisión que la ley reputa delito: sin ella no puede haber procedimiento ulterior.

ART. 134. Todo juez que adquiera conocimiento de que se ha cometido un delito, si existe el objeto material sobre el cual ha sido cometido, deberá hacer que se extienda una acta en que se describan minuciosamente los caracteres y señales que presente

Articles of the Code of Criminal Procedure of the State of Coahuila relative to the proof of the corpus delicti in criminal cases.

ART. 133. The basis for a criminal proceeding is the proof of the existence of an act or that of an omission which the law considers to be a delict: without it no further proceedings can be had.

ART. 134. Any judge who may obtain knowledge that a delict has been committed, if the material object on which it has been committed should exist, ought to have a report made wherein the character and signs presented by the hurt, or the

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la lesión, ó los vestigios que el delito haya dejado, el instrumento ó medio con que probable ó necesariamente haya debido cometerse y la manera de que se haya hecho uso del instrumento ó medio para la ejecución del delito. El objeto sobre que éste haya recaido, se describirá de modo que queden determinadas su situación y cuantas circunstancias puedan contribuir á indagar el orígen del delito, así como su gravedad y los accidentes que lo hayan acompañado. Esta acta se llama de descripción.

traces which may be left by the delict shall be minutely described, as well as the instrument or means with which it may probably or necessarily have been committed, and the manner in which the instrument may have been used for the execution of the delict. The object on which the delict may have been committed, shall be described in such a way that its situation and any circumstances that may contribute to determine the origin of the delict shall be set forth, as well as the gravity and the accidents that may have accompanied the delict. This report shall be called the description of the delict.

ART. 135. Además de la acta de descripción se extenderá otra de inventario, si se encontraren algunos instrumentos ú otras cosas que puedan tener relación próxima ó remota con el hecho mismo. Cuando los objetos encontrados fueren pocos y se hallaren en el mismo sitio ó á las inmediaciones del lugar en que se cometió el hecho, el acta de descripción podrá contener el inventario de aquellos.

ART. 135. Besides the description of the delict there shall be made an inventorial report, if there should be found any instruments or other things that may have a proximate or remote relation to the act itself. Should the objects found be few and be discovered in the same place or near by the place where the act was committed, the report containing the description may also comprise the inventory of such articles.

ART. 141. En el acto de la inspección del lugar en que se cometió el delito, el juez debe

ART. 141. During the official investigation relative to the place where the delict was com-

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examinar á todas las personas que puedan proporcionar algun esclarecimiento sobre el delito y sobre sus autores y cómplices, ó algunas noticias útiles para la averiguación de la verdad ó designar otras personas que puedan darlos.

mitted, the judge ought to examine all persons whose testimony may throw light on the delict and on its principals and accomplices, or afford any information that may be useful for the investigation of the truth, or designate some other persons who may be able to give such testimony.

ART. 148. Si el delito fuere de homicidio ú otro caso de muerte por causa desconocida y sospechosa ó solamente sospechosa, se procederá al examen del cadáver con intervención de peritos, y se ordenará su autopsia extendiéndose diligencia formal con expresión circunstanciada de la postura en que se halle el cadáver, del número de heridas ó lesiones, de las partes del cuerpo en que las tiene, del vestido y demás efectos que se encontraren y de las señales que se adviertan en el terreno inmediato.

ART. 148. If the delict should be homicide, or any other case of death owing to an unknown and suspicious cause, or simply owing to a suspicious cause, the examination of the corpse shall be proceeded with the attendance of experts, and the autopsy of the body shall be ordered, and a report be made stating with precision the position in which the corpse is found, the number of wounds or hurts, the portions of the body where the same may be discovered, the clothing and other articles that may be found, and any marks or signs that may be discovered in the immediate vicinity of the place.

ART. 149. Antes de procederse á la autopsia del cadáver se comprobará su identidad por medio de sus parientes ó amigos, que serán examinados en debida forma, para que declaren el nombre del muerto, su profesion y vecindad, las señas personales

ART. 149. Before beginning the autopsy of the corpse, its identity must be proved by means of the relatives or friends of the deceased, who shall be examined in legal form so that they may testify as to the name of the deceased, his profession

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y las ropas que vestía cuando salió de su casa.

ART. 150. Si no se puede identificar el cadáver, se describirán las señas particulares que tuviere, sus facciones, sus vestidos ó cualquiera otro objeto que se le encuentre; y si el estado del cadáver lo permite, se le expondrá al público por las horas que el juez crea conveniente, á fin de que pueda ser visto y reconocido, sacándose anemás, si fuere posible, retratos fotográficos de los cuales se agregará uno á los autos y se mandarán fijar los demás en los lugares públicos, cuando no se haya podido obtener aquel reconocimiento.

ART. 152. Si se hubiere sepultado el cadáver antes de practicar las diligencias anteriores, se ordenerá su exhumación cuando el juez lo juzgue necesario ó lo soliciten las partes acusadoras, por su cuenta, observando las debidas precauciones higiéncais y asistencia de peritos, y practicándose en seguida las diligencias que fuerren posibles de las que mencionan los antecedentes artículos.

and residence, his personal description and the clothing he wore when he left his house.

ART. 150. Should it not be possible to identify the corpse, the peculiar description of the deceased, as well as his features, his clothing and any other article that may be found on him shall be recorded; and if the condition of the corpse should permit, it may be exposed for inspection by the public during the hours which the judge may deem proper, so that it may be seen and recognized and, if possible, photographs shall be taken of the body and one of them shall be added to the record and the rest shall be affixed in public places if the corpse shall not have been identified.

ART. 152. If the corpse shall have been buried before the foregoing proceedings can be had, an order shall be issued so as to have it exhumed, should the judge think this proceeding be proper or the complainants demand it at their expense; all due hygienic precautions being taken and the exhumation being carried on in the presence of experts, and thereupon such proceedings as are mentioned in the foregoing articles shall, if possible, be carried on.

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ART. 153. Cuando porcualquiera causa *no pueda formarse juicio pericial con el examen del cadáver, ó éste no pueda exhumarse, aquel juicio se suplirá con las declaraciones de los testigos que hubiren visto antes el cadáver y las lesiones que haya tenido. Estos testigos manifestarán en que parte del cuerpo existian las lesiones, indicarán las armas con que crean que se hayan hecho y dirán si son de opinion que todas ó algunas de las lesiones hayan ocasionado la muerte.*

ART. 153. Whenever, owing to any circumstances, *no examination can be made by experts, or the corpse cannot be exhumed, such proceedings shall be substituted by the testimony of the witnesses who shall have seen the corpse before, as well as the hurts that it may have had. Said witnesses shall state in what part of the body the hurts existed and shall testify as to the arms with which they may believe that said hurts were made, and will state if, in their opinion, all or any of the said hurts shall have brought about the death of the deceased.*

ART. 154. En caso de que el cadáver no pueda encontrarse, el juez comprobará la existencia de la persona, el tiempo que haya trascurrido desde que no se tenga noticia de ella, el último lugar en que se le haya visto, y cómo el cadáver haya podido ser ocultado ó destruido. Además recogerá todos los medios de prueba que conduzcan á la comprobación ó existencia del cuerpo del delito.

ART. 154. Should it not have been possible to find the corpse, the judge must obtain proofs as to the existence of the individual, the time that may have elapsed since no news have been received regarding him, the last place where he may have been seen, and how the corpse could have been hidden or destroyed. Furthermore he shall obtain all means of proof that may lead to the evidence or existence of the *corpus delicti*.

ART. 155. Los peritos darán su declaracion sobre la causa de la muerte, manifestando en qué tiempo más ó menos próximo pudò acontecer esta, y si fué á consecuencia de las le-

ART. 155. The experts shall give their opinion regarding the cause of death, the approximate time when that event may have occurred, and if the death occurred owing to the hurts or

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siones ó antes de ellas, ó por el concurso de causas pre-existentes ó de las que sobrevinieron ó de otras extrañas el delito, teniendo presente lo que disponen los artículos 544, 545 y 546 del Código penal. Cuando los peritos no se expliquen respecto de estas circunstancias, el juez de oficio les interrogará acerca de ellas.

before these were inflicted, or owing to a combination of pre-existing causes or of those that occurred afterwards, or to others entirely foreign to the delict, and for that purpose they shall take into consideration the prescriptions of articles 544, 545 and 546 of the Penal Code. Whenever the experts shall not give any explanation regarding such circumstances, the judge *ex officio* must interrogate them concerning the same circumstances.

ART. 156. Sie se tratare de alguna persona herida ó golpeada, el juez, acompañado de los peritos, describirá las lesiones ó golpes, indicará el lugar en que estén, y señalara su longitud, anchura y profundidad ostensible, si hubiere peligro en averiguar cual sea la profundidad real. Hará que los peritos expresen la calidad de las lesiones y si estan hechas con armas de fuego, ó con armas punzantes, cortantes ó contundentes, ó de otro modo.

ART. 156. If the case may be of a person wounded or beaten, the judge assisted by experts, shall describe the wounds or blows and determine the site and the length, breadth and apparent depth thereof, should there be any danger of determining its real depth. He shall require the experts to express the nature of the hurts and whether they were caused by fire, cutting or pointed arms, or by bruising instruments, or in any other manner.

ART. 157. *Si los peritos no pudieren ser habidos desde luego, el juez procederá sin su asistencencia,* en los términos del artículo anterior.

ART. 157. *If it is not possible to obtain experts at once, the judge shall proceed with his investigation without them,* in conformity with the prescriptions of the foregoing article.

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Artículos 544, 545 y 546 del Código penal citados en el artículo 155 del Código de Procedimientos penales.

ART. 544. Para la imposicion de la pena no se tendrá como mortal una lesion sino cuando se verifiquen las tres circunstancias siguientes:

I. Que la lesion produzca por si sola y directamente la muerte; ó que aun cuando ésta resulte de causa distinta, esa causa sea desarrollada por la lesion ó efecto necesario ó inmediato de ella:

II. Que la muerte se verifique dentro de sesenta días contados desde él de la lesion.

III. Que despues de hacer la autopsia del cadáver, declaren dos peritos que la lesion fué mortal, sujetándose para ello á las reglas contenidas en este artículo y en los dos siguientes.

ART. 545. Siempre que se verifiquen las tres circustancias del artículo anterior, se tendrá como mortal una lesion, aunque se pruebe que se habría evitado la muerte con auxilios oportunos: que la lesion no habría sido mortal en otra persona; ó que lo fué á causa de la constitucion física de la víctima, ó

Articles 544, 545 and 546 of the Penal Code referred to in Art. 155 of the Code of Criminal Procedure.

ART. 544. For the infliction of punishment, a hurt shall not be considered mortal, unless the three following circumstances shall have occurred:

I. That the hurt by itself and directly shall produce death; or that even if death shall have occurred from another cause, the latter cause shall be due to the hurt or be the immediate or necessary result of the same.

II. That death shall occur within sixty days after the hurt may have been inflicted.

III. That after the autopsy of the corpse may be had, two experts shall have declared that the hurt was mortal, in conformity for such purpose with the rules contained in this article and the two following.

ART. 545. Whenever the three circumstances named in the foregoing article may occur, the hurt shall be considered mortal, although it may be proved that death could have been prevented by opportune help; that the hurt would not have been mortal in another person; or that it was mortal owing to the physical

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delas circunstancias en que recibió la lesion.

ART. 546. Como consecuencia de las declaraciones que preceden, no se tendrá como mortal una lesion, aunque muera el que la recibió; cuando la muerte sea resultado de una causa que ya existía y que no sea desarrollada por la lesion, ni cuando ésta se haya vuelto mortal por una causa posterior á ella como la aplicacion de medicamentos positivamente nocivos, operaciones quirúrgicas desgraciadas ó excesos ó imprudencias del paciente ó de los que lo asistan.

constitution of the deceased or to which occurred when he received the hurt.

ART. 546. As a result of the foregoing statements, a hurt shall not be considered mortal, even if the person who received it may die, when death shall have been the result of a cause already existing and may not have been due to the hurt, nor when the hurt shall become mortal through a cause occurring thereafter, as the application of medicines really noxious, unfortunate surgical operations, or abuses or imprudent acts of the patient or of those who may have assisted him.

Department of State,

Washington, April 10, 1900.

His Excellency

The Governor of ————

Sir: In connection with my letter of March 26 last, in relation to the extradition from Mexico of fugitives from the justice of the United States, I have the honor to enclose herewith for your further information a memorandum prepared at the request of the Department of State by the Mexican Ambassador at Washington, showing the formalities which are required by his Government to be observed in extradition cases under the treaty between the United States and Mexico of February 22, 1899.

I have the honor to be, Sir,

Your obedient servant,

JOHN HAY.

Enclosure: Memorandum as above.

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MEMORANDUM AS TO EXTRADITION FROM MEXICO.

1. Every requisition for extradition under the provisions of the treaty between the United States of America and Mexico shall be accompanied either by a copy of the sentence of the court in which the extraditable person was convicted, or by papers proving the alleged crime or offense. The requisition shall, in all cases, be also accompanied by a description of the accused, in order to establish his identity with the person whose extradition is demanded.

2. The corpus delicti of homicide in cases of a person not yet sentenced must be established by ocular inspection of the corpse and by medical testimony. If scientific evidence cannot be had, upon their impracticability being set forth, the testimony of reliable persons (experts to be preferred) or other proper evidence may be produced.

3. The general rule shall always be that, in order to prove the existence of the corpus delicti, which is a requisite for the arrest and commitment for trial of a person charged with the crime or offense, the best evidence the nature of the case admits of shall be presented, if possible to be had; but if not possible, then the best that can be had may be allowed.

4. The testimony of witnesses under fourteen years or of other disqualified persons will not be admitted, unless the circumstances of the case show that better evidence cannot be had.

5. Each witness must explain satisfactorily the manner in which the facts asserted by him or her came to his or her knowledge.

6. The provision contained in the third paragraph of Article VIII of the treaty for the addition of an "authenticated copy of the law of the demanding copy defining the crime or offense" shall be observed when the extradition is demanded for a crime or offense under the numbers 19 or 21 of the schedule of Article II.

7. In the cases of crimes or offenses committed or charged to have been committed by extraditable persons in any of the frontier States or Territories, requisitions for surrender may be made either through the diplomatic or consular agents of the demanding country, or through the authorities of such bordering State or Territory enumerated in Article IX of the treaty. In all other cases requisitions shall be made by the respective diplomatic agents, or, in their

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absence, by the superior consular officers, as prescribed by the first paragraph of Article VIII.

8. The provisional arrest authorized by Article X of the treaty must invariably be requested through the diplomatic or consular agent, whether the crime or offense was committed or charged to have been committed in the frontier States or Territories, or elsewhere.

April, 1900.

Department of State,

Washington, May 14, 1900.

His Excellency

The Governor of ————

Sir: Referring to my letter of April 10, 1900, and its accompanying memorandum by the Mexican Ambassador at this capital showing the formalities which are required by this Government to be observed in extradition cases under the treaty between the United States and Mexico of February 22, 1899, I have the honor to enclose for your information and guidance a further memorandum from the Mexican Ambassador modifying paragraphs 1 and 6 of the memorandum first mentioned. The modifications are underscored.

I have the honor to be, Sir,

Your obedient servant,

JOHN HAY.

MEMORANDUM.

1. Every requisition for extradition under the provisions of the treaty between the United States of America and Mexico shall be accompanied either by a copy of the sentence of the court in which the extraditable person was convicted, or by papers proving *that* the alleged crime or offense *has been committed and that there are presumptions against the accused.* The requisition shall, in all cases, be also accompanied by a description of the accused, in order to establish his identity with the person whose extradition is demanded.

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6. The provision contained in the third paragraph of Article VIII of the treaty for the addition of "an authenticated copy of the law of the demanding country defining the crime or offense" shall be observed *only* when the extradition is demanded for a crime or offense under the numbers 19 or 21 of the schedule of Article II.

Department of State,

Washington, June 4, 1906.

His Excellency
The Governor of ————

Sir: In view of certain irregularities which have sometimes occurred in connection with the return to the United States from foreign countries of fugitives from justice, applications for extradition of such fugitives which are addressed to the Secretary of State should hereafter state that such application is made solely for the purpose or purposes expressed therein, and not for the purpose of enforcing the collection of a debt, or of avoiding the penalty of a bail bond, or for any private purpose whatever, and that if the application be granted the criminal proceedings shall not be used for any of said purposes.

I have the honor to be, Sir,

Your obedient servant,

ROBERT BACON,
Acting Secretary.

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International convention creating an International Institute of Agriculture at Rome. Signed at Rome June 7, 1905; proclaimed January 29, 1908 284

Convention with *France* for the settlement of disputes by arbitration. Signed at Washington February 10, 1908; proclaimed March 14, 1908 291

Parcels-post convention with *Netherlands*. Signed at Washington May 10, 1907, at The Hague March 19, 1908; approved by the President May 10, 1907, by Netherlands March 24, 1908 294

International convention of American Republics on literary and artistic copyrights. Signed at Mexico City January 27, 1902; proclaimed April 9, 1908 300

Treaty with *Spain* for the extradition of fugitives from justice. Signed at Madrid June 15, 1904; protocol signed at San Sebastian August 13, 1907; proclaimed May 21, 1908 313

Convention with *Spain* for the settlement of disputes by arbitration. Signed at Washington April 20, 1908; proclaimed June 3, 1908 323

Convention with *Great Britain* for the settlement of disputes by arbitration. Signed at Washington April 4, 1908; proclaimed June 5, 1908 326

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APPENDIX II.

TREATIES IN FORCE.

The Senate of the United States, on February 11, 1904, adopted a resolution providing that a revised edition of the compilation of treaties in force should be prepared under the direction of the Committee on Foreign Relations, and that there should be inserted in such edition all treaties proclaimed and in force at the end of that session of Congress.

Pursuant to this resolution a revised edition of treaties in force was prepared under the direction of the Committee on Foreign Relations, by Mr. William M. Malloy, which contains the treaties and conventions, important international acts, agreements and protocols, excepting claim protocols to which the United States is a party, in force on April 28, 1904. A supplement was added containing the treaties ratified during that session of Congress, but which were not proclaimed and put in force until after the adjournment of Congress on April 28, 1904.

The compilation prior to its publication was submitted to the Secretary of State, and was examined by the Department of State with the object of excluding agreements and parts of agreements which are no longer considered as operative and of comprising all that are still effective.

References in the following pages are made to the treaties and conventions contained in that volume which are still deemed to be in force under the designation "U. S. Treaties 1904," and also to the Statutes at Large of the United States, where they also may be found. The synopsis of treaties, the notes as to their effect, and the chronological list of treaties, are taken from the treaty volume The treaties that have been entered into since the publication of that compilation are referred to by the volume and page of the Statutes at Large of the United States where they appear, except those made in 1908, which were not accessible at the time this work went to press.

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ALGIERS.

1795.

TREATY OF PEACE AND AMITY.

Concluded September 5, 1795; ratification advised by the Senate March 2, 1796. (Treaties and Conventions, 1889, p. 1.)

U. S. Treaties 1904, p. 21; 8 Stats. at Large, 133.

This treaty of twenty-two articles provided for peace, commercial intercourse, and friendly treatment of the citizens and shipping of the United States in consideration of an annual payment to the Dey of Algiers. It was superseded by the treaty of 1815.

1815.

TREATY OF AMITY AND PEACE.

Concluded June 30, 1815; ratification advised by the Senate December 21, 1815; ratified by the President December 26, 1815; proclaimed December 26, 1815. (Treaties and Conventions, 1889, p. 6.)

U. S. Treaties 1904, p. 21; 8 Stats. at Large, 224.

This treaty of twenty-two articles was signed by Commodore Decatur and William Shaler, and provided for the abolition of the annual payment, for the restitution of captives and property, for commercial intercourse, etc.

1816.

TREATY OF PEACE AND AMITY.

Concluded December 22 and 23, 1816; ratification advised by the Senate February 1, 1822; ratified by the President February 11, 1822; proclaimed February 11, 1822. (Treaties and Conventions, 1889, p. 10.)

U. S. Treaties 1904, p. 21; 8 Stats. at Large, 244.

By this treaty of twenty-two articles the same privileges included in the treaty of 1815 were renewed, with an additional article

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annulling the special rights accorded to United States vessels in case of war.

Algiers having become a province of France in 1830, the treaty became obsolete.

ARGENTINE REPUBLIC.

(ARGENTINE CONFEDERATION.)

1853.

TREATY FOR THE FREE NAVIGATION OF THE RIVERS PARANÁ AND URUGUAY.

Concluded July 10, 1853; ratification advised by the Senate June 13, 1854; ratified by the President July 5, 1854; ratifications exchanged December 20, 1854; proclaimed April 9, 1855. (Treaties and Conventions, 1889, p. 16.)

U. S. Treaties 1904, p. 22; 10 Stats. at Large, Treaties, 233.

ARTICLES.

I. Free navigation of Paraná and Uruguay rivers conceded.
II. Loading and unloading vessels.
III. Marking channels.
IV. Collection of customs and other dues.
V. Possession of Martin Garcia Island.
VI. Free navigation in time of war.
VII. Accession of other South American governments.
VIII. Most favored nation clause.
IX. Ratification.

1853.

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded July 27, 1853; ratification advised by the Senate June 13, 1854; ratified by the President June 29, 1854; ratifications exchanged December 20, 1854; proclaimed April 9, 1855. (Treaties and Conventions, 1889, p. 18.)

U. S. Treaties 1904, p. 24; 10 Stats. at Large, Treaties, 237.

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ARTICLES.

I. Amity.
II. Mutual freedom of commerce.
III. Most favored nation clause.
IV. No discriminating duties to be levied.
V. Navigation dues to be equal.
VI. Mutual privileges to vessels.
VII. Nationality of vessels.
VIII. Freedom to trade.
IX. Privileges of citizens; settling estates.
X. Exemptions from military service and forced loans; taxes.
XI. Diplomatic and consular agents.
XII. Privileges in time of war.
XIII. Mutual protection to citizens.
XIV. Ratification.

1896.

EXTRADITION CONVENTION.

Concluded September 26, 1896; ratification with amendments advised by Senate January 28, 1897; ratification advised February 5, 1900; ratified by President April 7, 1900; ratifications exchanged June 2, 1900; proclaimed June 5, 1900.

U. S. Treaties 1904, p. 29; 31 Stats. at Large, 1883.

ARTICLES.

I. Mutual delivery of the accused.
II. Extraditable crimes.
III. Nondelivery of citizens.
IV. Procedure.
V. Provisional detention.
VI. Political offenses.
VII. Limitations.
VIII. Offense for which to be tried.
IX. Articles in possession of accused.
X. Persons claimed by other countries.
XI. Expenses.
XII. Ratification; duration.

AUSTRIA-HUNGARY.

1829.

TREATY OF COMMERCE AND NAVIGATION.

Concluded August 27, 1829; ratification advised by the Senate February 10, 1830; ratified by the President February 11, 1830; ratifications exchanged February 10, 1831; proclaimed February 10, 1831. (Treaties and Conventions, 1889, p. 23.)

U. S. Treaties 1904, p. 33; 8 Stats. at Large, 398.

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ARTICLES.

I. Liberty of commerce and navigation.
II. Shipping charges to be equal.
III. No discrimination in import duties.
IV. Application of two preceding articles.
V. Most favored nation treatment of products.
VI. Reciprocal right of vessels to export.
VII. Coastwise trade.
VIII. No discriminations against vessels.
IX. Most favored nation favors.
X. Consular officers authorized.
XI. Property of deceased persons.
XII. Duration.
XIII. Ratification.

The period for the exchange of ratifications was extended, with the advice and consent of the Senate, by resolution of February 3, 1831, and the consent of the Emperor of Austria, expressed by his minister in the certificate of exchange of ratifications, February 10, 1831.

1848.

CONVENTION RELATIVE TO DISPOSAL OF PROPERTY AND CONSULAR JURISDICTION.

Concluded May 8, 1848; ratification advised and time for exchange of ratifications extended to July 4, 1850, by the Senate February 13, 1850; ratified by the President February 15, 1850; ratifications exchanged February 23, 1850; proclaimed February 25, 1850. (Treaties and Conventions, 1898, p. 27.)

U. S. Treaties, 1904, p. 37; 9 Stats. at Large, Treaties, 152.

ARTICLES.

I. Disposal of personal property.
II. Disposal of real property held by deceased persons.
III. Protecting property of absent heirs.
IV. Consular privileges; deserters.
V. Duration.

1856.

EXTRADITION CONVENTION.[1]

Concluded July 3, 1856; ratification advised by the Senate with amendment August 13, 1856; ratified by the President December 12, 1856; ratifications exchanged December 13, 1856; proclaimed December 15, 1856. (Treaties and Conventions, 1889, p. 29.)

U. S. Treaties 1904, p. 39; 11 Stats. at Large, 691.

[1] See In re Baruch, 41 Fed. 472; In re Adutt, 55 Fed. 376.

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ARTICLES.

I. Extraditable crimes; proceedings.
II. Persons not to be delivered.
III. Persons committing crimes in country where found.
IV. Duration.
V. Ratification.

1870.

CONSULAR CONVENTION.

Concluded July 11, 1870; ratification advised by the Senate December 9, 1870; ratified by the President December 19, 1870; time for exchange of ratifications extended by the Senate May 12, 1871; ratifications exchanged June 26, 1871; proclaimed June 29, 1871. (Treaties and Conventions, 1889, p. 31.)

U. S. Treaties 1904, p. 42; 17 Stats. at Large, 821.

ARTICLES.

I. Officers recognized.
II. Exemptions and immunities.
III. Exemptions as witnesses.
IV. Use of arms and flags.
V. Inviolability of archives.
VI. Powers of acting officers.
VII. Vice-consuls and consular agents.
VIII. Applications to local authorities.
IX. Performance of notarial acts.
X. Authority as to shipping.
XI. Disputes between masters and crews.
XII. Deserters from ships.
XIII. Settlement of damages at sea.
XIV. Shipwreck proceedings.
XI. Most favored nation privileges.
XVI. Notice of death of intestates.
XVII. Duration; ratification.

1870.

NATURALIZATION CONVENTION.

Concluded September 20, 1870; ratification advised by the Senate March 22, 1871; ratified by the President March 24, 1871; ratifications exchanged July 14, 1871; proclaimed August 1, 1871. (Treaties and Conventions, 1889, p. 37.)

U. S. Treaties 1904, p. 48; 17 Stats. at Large, 833.

ARTICLES.

I. Requirements necessary.
II. Liability for prior offenses.
III. Former treaties continued.
IV. Resumption of former citizenship.
V. Duration.
VI. Ratification.

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1871.

TRADEMARK CONVENTION.

Concluded November 25, 1871; ratification advised by the Senate January 18, 1872; ratified by the President January 27, 1872; ratifications exchanged April 22, 1872; proclaimed June 1, 1872. (Treaties and Conventions, 1889, p. 39.)

U. S. Treaties 1904, p. 50; 17 Stats. at Large, 917.

ARTICLES.

I. Mutual protection of trademarks.
II. Registration.
III. Duration.
IV. Ratification.

BADEN.

(See GERMAN EMPIRE.)

1857.

EXTRADITION CONVENTION.

Concluded January 30, 1857; ratification advised by the Senate March 12, 1857; ratified by the President March 23, 1857; ratifications exchanged April 21, 1857; proclaimed May 19, 1857. (Treaties and Conventions, 1889, p. 41.)

U. S. Treaties 1904, p. 52; 11 Stats. at Large, 713.

ARTICLES.

I. Extraditable crimes; proceedings.
II. Persons not to be delivered.
III. Persons committing crimes in country where found.
IV. Duration.
V. Ratification.

1868.

NATURALIZATION CONVENTION.

Concluded July 19, 1868; ratification advised by the Senate April 12, 1869; ratified by the President April 18, 1869; ratifications exchanged December 7, 1869; proclaimed January 10, 1870. (Treaties and Conventions, 1889, p. 43.)

U. S. Treaties 1904, p. 54; 16 Stats. at Large, 731.

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ARTICLES.

I. Requirements necessary.
II. Liability for prior offenses.
III. Former treaty continued.
IV. Resumption of former citizenship.
V. Duration.
VI. Ratification.

BAVARIA.

(See GERMAN EMPIRE.)

1845.

CONVENTION ABOLISHING DROIT D'AUBAINE AND TAXES ON EMIGRATION.

Concluded January 21, 1845; ratification advised by the Senate, with amendment, March 15, 1845; ratified by the President March 18, 1845; ratifications exchanged November 4, 1845; proclaimed August 16, 1846. (Treaties and Conventions, 1889, p. 45.)

U. S. Treaties 1904, p. 57; 9 Stats. at Large, Treaties, 9.

ARTICLES.

I. Taxes abolished.
II. Disposal of real property.
III. Disposal of personal property.
IV. Protecting property of absent heirs.
V. Disputes as to inheritances.
VI. Emigration from Bavaria not affected.
VII. Ratification.

1853.

EXTRADITION CONVENTION.[1]

Concluded September 12, 1853; ratification advised by the Senate with an amendment July 12, 1854; ratified by the President July 24, 1854; ratifications exchanged at London November 1, 1854; proclaimed November 18, 1854. (Treaties and Conventions, 1889, p. 47.)

U. S. Treaties 1904, p. 59; 10 Stats. at Large, Treaties, 174.

[1] See In re Thomas, 12 Blatchf. 370, Fed. Cas. No. 13,887.

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ARTICLES.

I. Extraditable crimes; proceedings.
II. Accession of other German States.
III. Persons not to be delivered.
IV. Persons committing crimes in country where found.
V. Duration.
VI. Ratification.

1868.

NATURALIZATION TREATY.

Concluded May 26, 1868; ratification advised by the Senate June 29, 1868; ratified by the President July 17, 1868; ratifications exchanged September 18, 1868; proclaimed October 8, 1868. (Treaties and Conventions, 1889, p. 49.)

U. S. Treaties 1904, p. 61; 15 Stats. at Large, 661.

ARTICLES.

I. Necessary requirements.
II. Liability for prior offenses.
III. Former convention continued.
IV. Resumption of former citizenship.
V. Duration.
VI. Ratification.

BELGIUM.

1845.

TREATY OF COMMERCE AND NAVIGATION.

Concluded November 10, 1845; ratification advised by the Senate March 26, 1846; ratified by the President March 30, 1846; ratifications exchanged March 30, 1846; proclaimed March 31, 1846. (Treaties and Conventions, 1889, p. 52.)

U. S. Treaties 1904, p. 64; 8 Stats. at Large, 606.

This treaty contained twenty articles, and was terminated August 20, 1858, by notice given by the Belgian Government.

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1858.

TREATY OF COMMERCE AND NAVIGATION.

Concluded July 17, 1858; ratification advised by the Senate March 8, 1859; ratified by the President April 13, 1859; ratifications exchanged April 16, 1859; proclaimed April 19, 1859. (Treaties and Conventions, 1889, p. 56.)

U. S. Treaties 1904, p. 64; 12 Stats. at Large, 1043.

This treaty contained eighteen articles, and was terminated July 1, 1875, by notice given by the Belgian Government.

1863.

CONVENTION RELATIVE TO IMPORT DUTIES AND CAPITALIZATION OF SCHELDT DUES.

Concluded May 20, 1863; ratification advised by the Senate February 26, 1864; ratified by the President March 5, 1864; ratifications exchanged June 24, 1864; proclaimed November 18, 1864. (Treaties and Conventions, 1889, p. 60.)

U. S. Treaties 1904, p. 64; 13 Stats. at Large, 655.

This convention contained five articles, and those which were not transitory have been superseded by the Treaty of 1875.

1863.

CONVENTION FOR THE EXTINGUISHMENT OF THE SCHELDT DUES.

Concluded July 20, 1863; ratification advised by the Senate February 26, 1864; ratified by the President March 5, 1864; ratifications exchanged June 24, 1864; proclaimed November 18, 1864. (Treaties and Conventions, 1889, p. 62.)

U. S. Treaties 1904, p. 65; 13 Stats. at Large, 655.

ARTICLES.

I. Scheldt dues extinguished.
II. Declaration by King of Belgium.
III. Tonnage and other dues.
IV. Payment by the United States.
V. Execution.
VI. Application.
VII. Ratification.

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1868.

NATURALIZATION CONVENTION.

Concluded November 16, 1868; ratification advised by the Senate April 12, 1869; ratified by the President April 18, 1869; ratifications exchanged July 10, 1869; proclaimed July 30, 1869. (Treaties and Conventions, 1889, p. 66.)

U. S. Treaties 1904, p. 68; 16 Stats. at Large, 66.

ARTICLES.

I. Recognition of naturalization.
II. Liability for prior offenses.
III. Exemption from military service.
IV. Resumption of former citizenship.
V. Duration.
VI. Ratification.

1868.

CONSULAR CONVENTION.

Concluded December 5, 1868; ratification advised by the Senate April 12, 1869; ratified by the President April 18, 1869; ratifications exchanged July 8, 1869; proclaimed March 7, 1870. (Treaties and Conventions, 1889, p. 68.)

U. S. Treaties 1904, p. 70; 16 Stats. at Large, 757.

This treaty, which contained sixteen articles, was terminated January 1, 1880, on notice given by the Belgian Government.

Federal case: In re Wildenhus, 28 Fed. 924.

1868.

TRADEMARK CONVENTION.

Concluded December 20, 1868; ratification advised by the Senate April 12, 1869; ratified by the President April 18, 1869; ratifications exchanged June 19, 1869; proclaimed July 30, 1869. (Treaties and Conventions, 1889, p. 72.)

U. S. Treaties 1904, p. 70; 16 Stats. at Large, 765.

This was an additional article to the treaty of 1858, and terminated with it July 1, 1875.

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1874.

EXTRADITION CONVENTION.

Concluded March 19, 1874; ratifications advised by the Senate March 27, 1874; ratified by the President March 31, 1874; ratifications exchanged April 30, 1874; proclaimed May 1, 1874. (Treaties and Conventions, 1889, p. 73.)

U. S. Treaties 1904, p. 70; 18 Stats. at Large, Treaties, 120.

This treaty contained eight articles, and was terminated November 18, 1882, on the exchange of ratifications of the Treaty of 1882.

Federal cases: Ex parte Van Hoven, 4 Dill. 411, Fed. Cas. No. 16,858; In re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563; In re Vandervelpen, 14 Blatchf. 137, Fed. Cas. No. 16,844.

1875.

TREATY OF COMMERCE AND NAVIGATION.

Concluded March 8, 1875; ratification advised by the Senate March 10, 1875; ratified by the President March 16, 1875; ratifications exchanged June 11, 1875; proclaimed June 29, 1875. (Treaties and Conventions, 1889, p. 76.)

U. S. Treaties 1904, p. 71; 19 Stats. at Large, Treaties, 72.

ARTICLES.

I. Freedom of commerce and navigation.
II. Duties payable by Belgian vessels.
III. Duties payable by United States vessels.
IV. Coasting trade.
V. Import trade.
VI. Export duties.
VII. Premiums, drawbacks, etc.
VIII. Fisheries excluded.
IX. Nationality of vessels.
X. Cargoes for other countries.
XI. Warehousing.
XII. Most favored nation privileges.
XIII. Shipwrecks.
XIV. Transit duty.
XV. Trademarks.
XVI. Duration.
XVII. Ratification.

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1880.

CONSULAR CONVENTION.

Concluded March 9, 1880; ratification advised by the Senate with amendments June 15, 1880; ratified by the President June 25, 1880; time for exchange of ratifications extended by the Senate January 5, 1881; ratifications exchanged February 25, 1881; proclaimed March 1, 1881. (Treaties and Conventions, 1889, p. 80.)

U. S. Treaties 1904, p. 75; 21 Stats. at Large, 776.

ARTICLES.

I. Officers authorized.
II. Privileges.
III. Exemptions.
IV. Testimony by consular officers.
V. Arms and flags.
VI. Inviolability of consulates.
VII. Acting officers.
VIII. Vice-consuls and consular agents.
IX. Applications to local authorities.
X. Performance of notarial acts.
XI. Authority as to shipping.
XII. Deserters from ships.
XIII. Settlement of damages at sea.
XIV. Shipwreck proceedings.
XV. Estates of deceased persons.
XVI. Duration; ratification.

1882.

EXTRADITION CONVENTION.

Concluded June 13, 1882; ratification advised by the Senate August 8, 1882; ratified by the President November 16, 1882; ratifications exchanged November 18, 1882; proclaimed November 20, 1882. (Treaties and Conventions, 1889, p. 85.)

U. S. Treaties 1904, p. 80; 22 Stats. at Large, 972.

This treaty contained eleven articles and was terminated June 14, 1902, on the exchange of ratifications of the treaty of 1901.

1884.

TRADEMARK CONVENTION.

Concluded April 7, 1884; ratification advised by the Senate June 12, 1884; ratified by the President July 7, 1884; ratifications exchanged July 7, 1884; proclaimed July 9, 1884. (Treaties and Conventions, 1889, p. 88.)

U. S. Treaties 1904, p. 80; 23 Stats. at Large, 766.

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ARTICLES.

I. Mutual protection.
II. Requirements.
III. Duration; ratification.

1901.

EXTRADITION CONVENTION.

Concluded October 26, 1901; ratification advised by Senate January 30, 1902; ratified by President June 13, 1902; ratifications exchanged June 14, 1902; proclaimed June 14, 1902.

U. S. Treaties 1904, p. 82; 32 Stats. at Large, 1894.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Offenses for which to be tried; third countries.
IV. Political offenses.
V. Nondelivery of citizens.
VI. Deferring extradition.
VII. Procedure.
VIII. Expenses.
IX. Limitations.
X. Articles in possession of accused.
XI. Ratification; duration.

BOLIVIA.

1858.

TREATY OF PEACE, FRIENDSHIP, COMMERCE, AND NAVIGATION.

Concluded May 13, 1858; ratification advised with amendments by the Senate June 26, 1860; amendments proposed by Constituent Assembly of Bolivia consented to by the Senate and time for exchange of ratifications extended February 3, 1862; ratified by the President February 17, 1862; ratifications exchanged November 9, 1862; proclaimed January 8, 1863. (Treaties and Conventions, 1889, p. 90.)

U. S. Treaties 1904, p. 87; 12 Stats. at Large, 1003.

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ARTICLES.

I. Mutual amity.
II. Most favored nation clause.
III. Freedom of trade; coasting trade; travel.
IV. Tonnage charges.
V. Nationality of Bolivian ships.
VI. Import and export duties.
VII. Liberty to trade.
VIII. Steam vessels in Bolivia.
IX. Asylum of ports, etc.
X. Assistance to shipwrecks.
XI. Captures by pirates.
XII. Property of decedents.
XIII. Protection to citizens.
XIV. Religious freedom.
XV. Freedom of navigation.
XVI. Neutral rights; free ships, free goods.
XVII. Contraband of war.
XVIII. Commerce permitted in case of war.
XIX. Delivery of contraband articles.
XX. Blockade.
XXI. Visitation and search.
XXII. Proof of nationality in case of war.
XXIII. Vessels under convoy.
XXIV. Adjudication of prizes.
XXV. Letters of marque forbidden.
XXVI. Navigation of the Amazon and La Plata.
XXVII. Tributaries of the Amazon and La Plata.
XXVIII. Rights of citizens in case of war.
XXIX. Confiscation forbidden.
XXX. Privileges to diplomatic and consular officers.
XXXI. Consular officers authorized.
XXXII. Exequaturs.
XXXIII. Consular exemptions.
XXXIV. Deserters from ships.
XXXV. Agreement for consular convention.
XXXVI. Duration; effect, etc., of treaty; ratification.

1900.

Extradition Convention.

Concluded April 21, 1900; ratification advised by Senate December 18, 1900; ratified by President August 2, 1901; ratifications exchanged December 23, 1901; proclaimed December 30, 1901.

U. S. Treaties 1904, p. 99; 32 Stats. at Large, 1857.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Procedure.
IV. Provisional detention.
V. Nondelivery of citizens.
VI. Political offenses.
VII. Limitations.
VIII. Prior offenses.
IX. Property seized with fugitive.
X. Persons claimed by other countries.
XI. Expenses.
XII. Ratification; duration.

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BORNEO.

1850.

CONVENTION OF AMITY, COMMERCE, AND NAVIGATION.

Concluded June 23, 1850; ratification advised and time for exchange of ratifications extended by the Senate June 23, 1852; ratified by the President January 31, 1853; ratifications exchanged July 11, 1853; proclaimed July 12, 1854. (Treaties and Conventions, 1889, p. 102.)

U. S. Treaties 1904, p. 103; 10 Stats. at Large, 89.

ARTICLES.

I. Amity.
II. Liberty of commerce.
III. Protection to United States citizens.
IV. Freedom of imports and exports.
V. Tonnage on American ships; exemptions.
VI. No expert duty on products of Borneo.
VII. Supplies for American ships of war.
VIII. Shipwrecks.
IX. Extraterritoriality in Borneo; ratification.

BRAZIL.

1828.

CONVENTION OF AMITY, COMMERCE, AND NAVIGATION.

Concluded December 12, 1828; ratification advised by the Senate March 10, 1829; ratified by the President March 10, 1829; ratifications exchanged March 18, 1829; proclaimed March 18, 1829. (Treaties and Conventions, 1889, p. 105.)

U. S. Treaties 1904, p. 106; 8 Stats. at Large, 390.

By a notice given from the Emperor of Brazil this treaty, "only for articles relating to commerce and navigation," was terminated December 12, 1841.

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ARTICLES.

I. Amity.
II. Favored nation clause.
III. Freedom of commerce and navigation; coasting trade.
IV. No discrimination on vessels.
V. Import and export duties.
VI. Freedom of trade.
VII. Embargoes.
VIII. Asylum in ports.
IX. Captures by pirates.
X. Shipwrecks.
XI. Disposal of property.
XII. Special protection.
XIII. Religious freedom.
XIV. Rights of neutrals.
XV. Neutral property under enemies' flag.
XVI. Contraband of war.
XVII. Trade with nonblockaded ports.
XVIII. Seizure of contraband articles.
XIX. Blockades.
XX. Visitation and search.
XXI. Ship's papers in case of war.
XXII. Vessels under convoy.
XXIII. Prize courts.
XXIV. Letters of marque forbidden.
XXV. Protection in case of war.
XXVI. Confiscation forbidden.
XXVII. Diplomatic officers.
XXVIII. Consular officers.
XXIX. Exequaturs.
XXX. Consular exemptions.
XXXI. Deserters from ships.
XXXII. Consular convention.
XXXIII. Duration; effect, etc.; ratification.

1849.

Convention for Satisfaction of Claims of Citizens of the United States on Brazil.

Concluded January 27, 1849; ratification advised by the Senate January 14, 1849; ratified by the President January 18, 1850; ratifications exchanged January 18, 1850; proclaimed January 19, 1850. (Treaties and Conventions, 1889, p. 115.)

U. S. Treaties 1904, p. 116; 9 Stats. at Large, Treaties, 157.

By this convention of six articles, 530,000 milreis were paid by Brazil in satisfaction of claims made by United States citizens, and the amount was distributed by the United States.

1878.

Diplomatic Agreement Concerning Trademarks.

Concluded September 24, 1878; ratification advised by the Senate January 20, 1879; ratified by the President February 5, 1879; proclaimed June 17, 1879. (Treaties and Conventions, 1889. p. 118.)

U. S. Treaties 1904, p. 116; 21 Stats. at Large, 659.

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1898.

EXTRADITION CONVENTION AND PROTOCOL.

Concluded, respectively, May 14, 1897, and May 28, 1898; ratification advised by Senate February 28, 1899; ratified by President February 13, 1903; ratifications exchanged April 18, 1903; proclaimed April 30, 1903.

U. S. Treaties 1904, p. 117; 33 Stats. at Large, pt. 2, p. 2091.

ARTICLES.

I. Delivery of the accused.
II. Extraditable crimes.
III. Political offenses.
IV. Offense for which tried; third government.
V. Nondelivery of citizens.
VI. Extradition deferred.
VII. Person claimed by other countries.
VIII. Limitations.
IX. Property seized with fugitive.
X. Procedure.
XI. Provisional detention.
XII. Expenses.
XIII. Ratification; duration.

BREMEN.

(See GERMAN EMPIRE.)

The Free Hanseatic City of Bremen (now incorporated in the German Empire), September 6, 1853, acceded to the extradition convention between the United States and Prussia of June 16, 1852. (Treaties and Conventions, 1889, p. 118.)

U. S. Treaties 1904, p. 123.

BRUNSWICK AND LÜNEBURG.

(See GERMAN EMPIRE.)

1854.

CONVENTION RESPECTING THE DISPOSITION OF PROPERTY.

Concluded August 21, 1854; ratification advised by the Senate with amendment March 3, 1855; ratified by the President July 10, 1855; ratifications exchanged July 28, 1855; proclaimed July 30, 1855. (Treaties and Conventions, 1889, p. 119.)

U. S. Treaties 1904, p. 123; 11 Stats. at Large, 601.

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ARTICLES.

I. Disposition of personal property.
II. Disposition of real estate.
III. Duration; ratification.

CENTRAL AMERICA.

1825.

CONVENTION OF PEACE, AMITY, COMMERCE AND NAVIGATION.

Concluded December 5, 1825; ratification advised by the Senate December 29, 1825; ratified by the President January 16, 1826; ratifications exchanged August 2, 1826; proclaimed October 28, 1826. (Treaties and Conventions, 1889, p. 121.)

U. S. Treaties 1904, p. 125; 8 Stats. at Large, 322.

This treaty, consisting of thirty-three articles, terminated as to articles relating to commerce and navigation, August 2, 1838, by their own limitations, and the entire treaty was abrogated by the dissolution of the Republic in 1839.

CHILE.

1832.

CONVENTION OF PEACE, AMITY, COMMERCE AND NAVIGATION.

Concluded May 16, 1832; ratification advised by the Senate December 19, 1832; ratified by the President April 26, 1834; ratifications exchanged April 29, 1834; proclaimed April 29, 1834. (Treaties and Conventions, 1889, p. 131.)

U. S. Treaties 1904, p. 126; 8 Stats. at Large, 434.

This treaty, containing thirty-one articles relating to commerce and navigation, consular and diplomatic privileges, etc., remained in force until January 20, 1850, when it was terminated on notice given by the Chilean government.

Federal case: United States v. Trumbull, 48 Fed. 94.

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1833.

CONVENTION ADDITIONAL TO THE GENERAL TREATY OF 1832.

Concluded September 1, 1833; ratification advised by the Senate April 24, 1834; ratified by the President April 26, 1834; ratifications exchanged April 29, 1834; proclaimed April 29, 1834. (Treaties and Conventions, 1889, p. 140.)

U. S. Treaties 1904, p. 126; 8 Stats. at Large, 456.

This convention of four articles extended the time for the exchange of ratifications of the convention of 1832, and was explanatory of certain articles. It was terminated January 20, 1850, on notice given by the Chilean government.

1858.

CONVENTION FOR ARBITRATION OF MACEDONIAN CLAIMS.

Concluded November 10, 1858; ratification advised by the Senate March 8, 1859; ratified by the President August 4, 1859; ratifications exchanged October 15, 1859; proclaimed December 22, 1859. (Treaties and Conventions, 1889, p. 142.

U. S. Treaties 1904, p. 126; 12 Stats. at Large, 1083.

The claims of the owners of the property referred to in the treaty were submitted to the arbitration of the King of Belgium, who, on May 15, 1863, rendered an award in favor of the United States, allowing $42,400 with interest.

1892.

CLAIMS CONVENTION.

Concluded August 7, 1892; ratification advised by the Senate December 8, 1892; ratified by the President December 16, 1892; ratifications exchanged January 26, 1893; proclaimed January 28, 1893.

U. S. Treaties 1904, p. 127; 27 Stats. at Large, 965.

This treaty of twelve articles provided for the submission of the claims of the United States citizens against Chile and of Chilean citizens against the United States to a commission. The commis-

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sion met in Washington, D. C., October 9, 1893, and held their final session April 9, 1894, awarding $240,564.35 to the United States for its citizens.

1897.

CLAIMS CONVENTION.

Concluded May 24, 1897; ratification advised by the Senate February 28, 1899; ratified by President March 1, 1899; ratifications exchanged March 12, 1900; proclaimed March 12, 1900.

U. S. Treaties 1904, p. 127; 31 Stats. at Large, 1868.

This treaty, containing two articles, revived the claims convention of August 7, 1892.

1900.

EXTRADITION TREATY.

Concluded April 17, 1900; ratification advised by Senate December 18, 1900; ratified by President May 24, 1900; ratifications exchanged May 27, 1902; proclaimed May 27, 1902.

U. S. Treaties 1904, p. 128; 32 Stats. at Large, vol. 2, p. 1850.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Procedure.
IV. Provisional detention.
V. Nondelivery of citizens.
VI. Political offenses.
VII. Limitations.
VIII. Prior offenses.
IX. Property seized with fugitive.
X. Persons claimed by other countries.
XI. Expenses.
XII. Ratification; duration.

CHINA.

[NOTE.—The treaty as to commercial relations, concluded October 8, 1903, Article XVII, provides: "It is agreed . . . . that all the provisions of the several treaties between the United States and China which were in force on the 1st day of January, 1900, are continued in full force and effect, *except in so far as they are modified by the present treaty or other treaties to which the United States is a party.*"]

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1844.

TREATY OF PEACE, AMITY, AND COMMERCE.

Concluded July 3, 1844; ratification advised by the Senate January 16, 1845; ratified by the President January 17, 1845; ratifications exchanged December 31, 1845; proclaimed April 18, 1846. (Treaties and Conventions, 1889, p. 145.)

U. S. Treaties, 1904, pp. 132, 133, 134; 8 Stats. at Large, 592.

As the Treaty of 1858 was negotiated as a substitute, the references are given to the corresponding articles in the later treaty, and the articles not referred to therein are printed in the treaty volumes.

ARTICLES.

I. Peace and amity. (See Art. I, p. 135.)
II. Import and export duties. (See Treaty of November 8, 1858, p. 145.)
III. Open ports. (See Art. XIV, p. 139.)
IV. Consular officers. (See Art. X, p. 138.)
V. Commerce. (See Art. XV, p. 140.)
VI. Tonnage duties. (See Art. XVI, p. 140.)
VII. Passenger and cargo boats.
VIII. Pilots, etc. (See Art. XII, p. 140.)
IX. Custom-house officers. (See Art. XVIII, p. 140.)
X. Vessels arriving in China. (See Art. XIX, p. 141.)
XI. Ascertainment of duties. (See Art. XX, p. 142.)
XII. Standard weights and measures.
XIII. Payment of duties. (See Art. XXII, p. 142.)
XIV. Transshipment of goods. (See Art. XXIII, p. 143.)
XV. Liberty to trade.
XVI. Collection of debts. (See Art. XXIV, p. 143.)
XVII. Privileges of open ports. (See Art. XII, p. 138.)
XVIII. Chinese teachers, etc. (See Art. XXV, p. 143.)
XIX. Protection to United States citizens. (See Art. XI, p. 138.)
XX. Re-exportation. (See Art. XXI, p. 142.)
XXI. Punishment for crimes. (See Art. XI, p. 138.)
XXII. Trade with China in case of war. (See Art. XXVI, p. 143.)
XXIII. Reports by consuls.
XXIV. Communications with officials. (See Art. XXVIII, p. 144.)
XXV. Rights of United States citizens. (See Art. XXVII, p. 144.)
XXVI. Merchant vessels in Chinese waters. (See Art. XIII, p. 139.)
XXVII. Shipwrecks, etc. (See Art. XIII, p. 139.)
XXVIII. Embargo.
XXIX. Control over seamen. (See Art. XVIII, p. 140.)
XXX. Official correspondence. (See Art. VII, p. 137.)
XXXI. Communications. (See Art. VIII, p. 137.)
XXXII. Naval vessels in Chinese waters. (See Art. IX, p. 137.)
XXXIII. Clandestine trade. (See Art. XIV, p. 139.)
XXXIV. Duration; ratification.

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1858.

TREATY OF PEACE, AMITY, AND COMMERCE.[1]

Concluded June 18, 1858; ratification advised by the Senate December 15, 1858; ratified by the President December 21, 1858; ratifications exchanged August 16, 1859; proclaimed January 26, 1860. (Treaties and Conventions, 1889, p. 159.)

U. S. Treaties 1904, p. 135; 12 Stats. at Large, 1023.

ARTICLES.

I. Declaration of amity.
II. Deposit of treaty.
III. Promulgation.
IV. Diplomatic privileges.
V. Visit of minister to capital.
VI. Residence of Minister at the capital.
VII. Correspondence.
VIII. Personal interviews.
IX. Naval vessels in Chinese waters.
X. Consuls authorized.
XI. United States citizens in China.
XII. Privileges in open ports.
XIII. Shipwrecks; pirates.
XIV. Open ports; clandestine trade prohibited.
XV. Commerce permitted; tariff.
XVI. Tonnage duties.
XVII. Pilots, etc.
XVIII. Control of ships, etc.
XIX. Ships' papers, etc.
XX. Customs examinations.
XXI. Re-exportation.
XXII. Payment of duties.
XXIII. Transshipment of goods.
XXIV. Collection of debts.
XXV. Chinese teacher, etc.
XXVI. Trade with China in case of war.
XXVII. Rights of United States citizens.
XXVIII. Communications with officers.
XXIX. Freedom of religion.
XXX. Most favored nation privileges to United States citizens; ratification.

1858.

TREATY ESTABLISHING TRADE REGULATIONS AND TARIFF.

Concluded November 8, 1858; ratification advised by the Senate March 1, 1859; ratified by the President March 3, 1859; ratifications exchanged August 15, 1859. (Treaties and Conventions, 1889, p. 169.)

U. S. Treaties 1904, p. 145; 12 Stats. at Large, 1069.

[1] See Treaty of July 28, 1868, and Treaty of October 8, 1903.

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1858.

CLAIMS CONVENTION.

Concluded November 8, 1858; ratification advised by the Senate March 1, 1859; ratified by the President March 3, 1859; ratifications exchanged August 15, 1859. (Treaties and Conventions, 1889, p. 178.)

U. S. Treaties 1904, p. 155; 12 Stats. at Large, 1081.

The arrangement made at Tien-Tsin, and called a convention by the preamble to this convention, was made through the medium of correspondence, and the supplemental convention of November 8, 1858, was entered into to carry it into effect. Under this convention $735,238.97 was paid to the United States minister to China, and a commission appointed to decide upon the claims. The commission awarded claimants $489,187.95, and the Chinese government refusing to receive the surplus it was finally transmitted to the United States and invested in government bonds. From this fund there was paid out by the Secretary of State for claims against China $281,319.64, and on April 24, 1885, the balance, amounting to $453,400.90, was returned to the Chinese minister at Washington.

1868.

TREATY OF TRADE, CONSULS AND EMIGRATION.[1]

Concluded July 28, 1868; ratification advised by the Senate with amendments July 24, 1868; amendments incorporated in the treaty July 28, 1868; ratified by the President October 19, 1868; ratifications exchanged November 23, 1869; proclaimed February 5, 1870. (Treaties and Conventions, 1889, p. 179.)

U. S. Treaties 1904, p. 155; 16 Stats. at Large, 739.

[1] See Treaty of June 18, 1858, and Treaty of October 8, 1903. See, also, Chae Chan Ping v. United States, 130 U. S. 581, 9 Sup. Ct. Rep. 623, 32 L. ed. 1068; Ex parte Lau Ow Bew, 141 U. S. 583, 12 Sup. Ct. Rep. 43, 35 L. ed. 868; Lau Ow Bew v. United States, 144 U. S. 47, 12 Sup. Ct. Rep. 517, 36 L. ed. 340; Fong Gue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. Rep. 1016, 37 L. ed. 905; In re Ah Fong, 3 Saw. 144, Fed. Cas. No. 102; Chapman v. Toy Long, 4 Saw. 28, Fed. Cas. No. 2610; Baker v. Portland, 5 Saw. 566, Fed. Cas. No. 777; In re Wong Yung Quy, 6 Saw. 237, 47 Fed. 717; In re Ah Chong, 6 Saw. 451, 2 Fed. 733; In re Parrott, 6 Saw. 349, 1 Fed. 481; United States v. Douglas, 17 Fed. 634.

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ARTICLES.

I. Jurisdiction over land in China.
II. Regulation of commerce.
III. Chinese consuls.
IV. Religious freedom.
V. Voluntary emigration.
VI. Privileges of travel and residence.
VII. Education.
VIII. Internal improvements in China.

1880.

IMMIGRATION TREATY.[1]

Concluded November 17, 1880; ratification advised by the Senate May 5, 1881; ratified by the President May 9, 1881; ratifications exchanged July 19, 1881; proclaimed October 5, 1881. (Treaties and Conventions, 1889, p. 182.)

U. S. Treaties 1904, p. 159; 22 Stats. at Large, 739.

ARTICLES.

I. Suspension of Chinese immigration.
II. Rights of Chinese in the United States.
III. Protection of Chinese in the United States.
IV. Notification of legislation; ratification.

[1] See Treaty of 1894. See, also, Federal cases Chew Heong v. United States, 112; U. S. 536, 5 Sup. Ct. Rep. 255, 28 L. ed. 770; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220; Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. Rep. 656, 763, 30 L. ed. 766; United States v. Jung Ah Lung, 124 U. S. 621, 8 Sup. Ct. Rep. 663, 31 L. ed. 591; Chae Chan Ping v. United States, 130 U. S. 581, 9 Sup. Ct. Rep. 623, 32 L. ed. 1068; Wan Shing v. United States, 140 U. S. 424, 11 Sup. Ct. Rep. 729, 35 L. ed. 503; Ex parte Lau Ow Bew, 141 U. S. 583, 12 Sup. Ct. Rep. 43, 35 L. ed. 868; Lau Ow Bew v. United States, 144 U. S. 47, 12 Sup. Ct. Rep. 517, 36 L. ed. 340; Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. Rep. 1016, 37 L. ed. 905; In re Ah Kee, 22 Blatchf. 520, 22 Fed. 519; In re Ah Lung, 9 Saw. 306, 18 Fed. 28; In re Leong Yick Dew, 10 Saw. 38, 19 Fed. 490; In re Ah Quan, 10 Saw. 222, 21 Fed. 182; In re Shong Toon, 10 Saw. 268, 21 Fed. 386; In re Ah Moy, 10 Saw. 345, 21 Fed. 785; In re Chew Heong, 10 Saw. 361, 21 Fed. 791; In re Quong Woo, 7 Saw. 526, 13 Fed. 229; Case of Chinese Merchant, 7 Saw. 546, 13 Fed. 605; In re Moncan, 8 Saw. 350, 14 Fed. 44; In re Ho King, 8 Saw. 438, 14 Fed. 724; United States v. Douglass, 17 Fed. 634; In re Chin Ah On, 9 Saw. 343, 18 Fed. 506; In re Pong Ah Chee, 18 Fed. 527; In re Tung Yeong, 9 Saw. 620, 19 Fed. 184; Case of Chinese Wife, 21 Fed. 785; Case of Chinese Laborer, 21 Fed. 791; In re Ah Ping, 23 Fed. 329; In re Chae Chan Ping, 13 Saw. 486, 36 Fed. 431; In re Chung Toy Ho, 42 Fed. 398, 9 L. R. A. 204; United States v. Ah Fawn, 57 Fed. 591; United States v. Yong Yew, 83 Fed. 832.

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1880.

TREATY AS TO COMMERCIAL INTERCOURSE AND JUDICIAL PROCEDURE.

Concluded November 17, 1880; ratification advised by the Senate May, 5, 1881; ratified by the President May 9, 1881; ratifications exchanged July 19, 1881; proclaimed October 5, 1881. (Treaties and Conventions, 1889, p. 184.)

U. S. Treaties 1904, p. 161; 22 Stats. at Large, 828.

ARTICLES.

I. Commercial relations.
II. Importation of opium forbidden.
III. Equality of duties.
IV. Trials of actions in China.

1894.

CONVENTION REGULATING CHINESE IMMIGRATION.[1]

Concluded March 17, 1894; ratification advised by the Senate August 13, 1894; ratified by the President August 22, 1894; ratifications exchanged December 7, 1894; proclaimed December 8, 1894

U. S. Treaties 1904, p. 163; 28 Stats. at Large, 1210.

(This treaty was denounced by China, to take effect December 7. 1904.)

ARTICLES.

I. Immigration of Chinese laborers prohibited for ten years.
II. Regulations for return to the United States.
III. Classes of Chinese not affected.
IV. Protection of Chinese in the United States.
V. Registration of citizens in China.
VI. Duration.

1903.

TREATY AS TO COMMERCIAL RELATIONS.

Concluded October 8, 1903; ratification advised by Senate December 18, 1903; ratified by President January 12, 1904; ratifications exchanged January 13, 1904; proclaimed January 13. 1904.

U. S. Treaties 1904, p. 166; 33 Stats. at Large, 2208.

[1] See United States v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299; In re Lee Gon Yung, 111 Fed. 998.

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ARTICLES.

I. Diplomatic privileges.
II. Consular privileges.
III. Citizens in China.
IV. Abolition of *likin*.
V. Tariff duties.
VI. Establishment of warehouses by United States citizens.
VII. Mining regulations.
VIII. Drawback certificates.
IX. Trademarks.
X. Patents.
XI. Copyrights.
XII. Navigation of inland waters, and making Mukden and Antung open ports.
XIII. Uniform coinage.
XIV. Religious liberty and concession to missionary societies.
XV. Reformation of judicial system; extraterritorial rights.
XVI. Morphia and instruments for its injection.
XVII. Existing treaties continued in force; duration; revision of annexed tariff; and ratification.

ANNEXES.

I. Opium and salt.
II. Native customs offices.
III. Tariff schedule.
Note change of Rule II.

COLOMBIA.

The Republic of Colombia, established in 1819, was divided in November, 1831, into three independent republics, New Grenada, Venezuela, and Ecuador. In 1862 its name was changed to the United States of Colombia, and in 1886 the states were abolished and the country became the Republic of Colombia. The treaties with New Grenada are given in chronological order with those of Colombia.

1824.

TREATY OF AMITY, COMMERCE, AND NAVIGATION.

Concluded October 3, 1824; ratification advised by the Senate March 3, 1825; ratified by the President March 7, 1825; ratifications exchanged May 27, 1825; proclaimed May 31, 1825. (Treaties and Conventions, 1889, p. 186.)

U. S. Treaties 1904, p. 194; 8 Stats. at Large, 306.

This treaty of thirty-one articles expired by its own limitation October 3, 1836.

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(NEW GRANADA.)

1846.

TREATY OF PEACE, AMITY, NAVIGATION, AND COMMERCE.

Concluded December 12, 1846; ratification advised by the Senate June 3, 1848; ratified by the President June 10, 1848; ratifications exchanged June 10, 1848; proclaimed June 12, 1848. (Treaties and Conventions, 1889, p. 195.)

U. S. Treaties 1904, p. 194; 9 Stats. at Large, Treaties, 79.

ARTICLES.

I. Amity.
II. Most favored nation clause.
III. Commerce and navigation.
IV. Mutual privileges of shipping.
V. Customs duties.
VI. Declaration of reciprocal treatment.
VII. Freedom of trade.
VIII. Embargo.
IX. Asylum to vessels.
X. Captures by pirates.
XI. Shipwrecks.
XII. Disposal of property.
XIII. Mutual protection.
XIV. Religious freedom.
XV. Neutrality; free ships, free goods.
XVI. Enemy's property.
XVII. Contraband goods.
XVIII. Trade by neutrals.
XIX. Confiscation of contraband.
XX. Blockade.
XXI. Visitation and search.
XXII. Proof of nationality of vessels.
XXIII. Vessels under convoy.
XXIV. Prize cases.
XXV. Conduct of hostilities.
XXVI. Letters of marque.
XXVII. Protection in case of war.
XXVIII. Confiscation prohibited.
XXIX. Diplomatic privileges.
XXX. Consular officers.
XXXI. Consular rights.
XXXII. Consular exemptions.
XXXIII. Deserters from ships.
XXXIV. Agreement for consular convention.
XXXV. Isthmus of Panama; duration; violations.
XXXVI. Ratification.
Additional article. Acceptance of nationality of vessels.

1850.

CONSULAR CONVENTION.

Concluded May 4, 1850; ratification advised by the Senate September 24, 1850; ratified by the President November 14, 1850; ratifications exchanged October 30, 1851; proclaimed December 5, 1851. (Treaties and Conventions, 1889, p. 206.)

U. S. Treaties 1904, p. 206; 10 Stats. at Large, Treaties, 80.

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ARTICLES.

I. Officers authorized.
II. Exequaturs.
III. Functions.
IV. Good offices.
V. Prerogatives, exemptions, etc.
VI. Legal status of consuls.
VII. Passports.
VIII. Ratification.
IX. Duration.

1857.

CLAIMS CONVENTION.

Concluded September 10, 1857; ratification advised by the Senate with amendments March 8, 1859; ratified by the President March 12, 1859; time for exchange of ratifications extended by the Senate May 8, 1860; ratifications exchanged November 5, 1860; proclaimed November 8, 1860. (Treaties and Conventions, 1889, p. 210.)

U. S. Treaties 1904, p. 211; 12 Stats. at Large, 985.

The commission under this treaty met at Washington June 10, 1861, and adjourned March 9, 1862. Amount of awards $496,235.47. Not having completed all the cases presented to them the following treaty was concluded, extending the commission.

(COLOMBIA.)

1864.

CLAIMS CONVENTION.

Concluded February 10, 1864; ratification advised by the Senate June 10, 1864; ratified by the President July 9, 1864; time for exchange of ratifications extended by the Senate June 25, 1864; ratifications exchanged August 19, 1865; proclaimed August 19, 1865. (Treaties and Conventions, 1889, p. 213.)

U. S. Treaties 1904, p. 211; 13 Stats. at Large, 685.

Under this convention a new commission was organized, which met at Washington August 4, 1865, and adjourned May 19, 1866. The awards amounted to $88,267.68.

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1888.

EXTRADITION CONVENTION.

Concluded May 7, 1888; ratification advised by the Senate with amendments March 26, 1889; ratification with amendments proposed by Colombia advised by the Senate February 27, 1890; ratified by the President March 12, 1890; ratifications exchanged November 12, 1890; proclaimed February 6, 1891.

U. S. Treaties 1904, p. 211; 26 Stats. at Large, 1534.

ARTICLES.

I. Reciprocal delivery of accused.
II. Extraditable crimes.
III. Proceedings.
IV. Persons under arrest.
V. Political offenses.
VI. Requisitions and surrender.
VII. Temporary detention.
VIII. Evidence required.
IX. Delivery of foreigners.
X. Persons not to be delivered.
XI. Persons under obligations.
XII. Expenses.
XIII. Duration; ratification.

COSTA RICA.

1851.

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded July 10, 1851; ratification advised by the Senate March 11, 1852; ratified by the President May 25, 1852; ratifications exchanged May 26, 1852; proclaimed May 26, 1852. (Treaties and Conventions, 1889, p. 222.)

U. S. Treaties 1904, p. 215; 10 Stats. at Large, Treaties, 18

ARTICLES.

I. Amity.
II. Freedom of commerce and navigation.
III. Most favored nation privileges.
IV. No discrimination in duties.
V. Tonnage duties.
VI. No discrimination on vessels.
VII. Equal trade privileges.
VIII. Equal treatment of citizens.
IX. Exemption from military service, etc.
X. Consular and diplomatic privileges.
XI. Rights in case of war.
XII. Property rights.
XIII. Duration.
XIV. Ratification.

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1860.

CLAIMS CONVENTION.

Concluded July 2, 1860; ratification advised by the Senate January 16, 1861; ratified by the President November 7, 1861; time for exchange of ratifications extended by the Senate March 12, 1861; ratifications exchanged November 9, 1861; proclaimed November 11, 1861. (Treaties and Conventions, 1889, p. 227.)

U. S. Treaties 1904, p. 220; 12 Stats. at Large, 1135.

This convention of nine articles provided for a commission of three, who met at Washington February 8, 1862, and adjourned November 6, 1862. The amount awarded against Costa Rica was $25,704.14.

1900.

PROTOCOL FOR THE CONSTRUCTION OF AN INTEROCEANIC CANAL.

Concluded December 1, 1900.

U. S. Treaties 1904, p. 220.

It is agreed between the two governments that when the President of the United States is authorized by law to acquire control of such portion of the territory now belonging to Costa Rica as may be desirable and necessary on which to construct and protect a canal of depth and capacity sufficient for the passage of vessels of the greatest tonnage and draft now in use, from a point near San Juan del Norte on the Caribbean Sea, via Lake Nicaragua to Brito on the Pacific Ocean, they mutually engage to enter into negotiations with each other to settle the plan and the agreements, in detail, found necessary to accomplish the construction and to provide for the ownership and control of the proposed canal.

As preliminary to such future negotiations it is forthwith agreed that the course of said canal and the terminals thereof shall be the same that were stated in a treaty signed by the plenipotentiaries of the United States and Great Britain on February 5, 1900, and now pending in the Senate of the United States for confirmation, and that the provisions of the same shall be adhered to by the United States and Costa Rica.

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In witness whereof, the undersigned have signed this protocol and have hereunto affixed their seals.

Done in duplicate at Washington this first day of December, 1900.

JOHN HAY. [Seal.]
J. B. CALVO. [Seal.]

CUBA.

1902.

COMMERCIAL CONVENTION.[1]

Concluded December 11, 1902; ratification advised by Senate March 19, 1903; ratified by President March 30, 1903; ratifications exchanged March 31, 1903; proclaimed December 17, 1903.

U. S. Treaties 1904, p. 221; 33 Stats. at Large, 2136.

ARTICLES.

I. Articles on free list.
II. Articles of Cuba admitted at reduction of twenty per cent.
III. Articles of United States admitted at reduction of twenty per cent.
IV. Articles of United States admitted at reductions of twenty-five, thirty, and forty per cent, respectively.
V. Regulations to protect revenue.
VI. Tobacco.
VII. Similar articles.
VIII. Rates of duty to continue preferential.
IX. National or local taxes.
X. Changes of tariff; revision of treaty.
XI. Ratification; duration.

1903.

SUPPLEMENTARY COMMERCIAL CONVENTION.

Concluded January 26, 1903; ratification advised by the Senate February 16, 1903; ratified by the President March 30, 1903; ratifications exchanged March 31, 1903; proclaimed December 17, 1903.

U. S. Treaties 1904, p. 225; 33 Stats. at Large, 2145.

[1] Congress by an act approved December 17, 1903, gave its approval to this convention.

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This treaty contains one article, extending for two months from January 31, 1903, ratification of commercial treaty of December 11, 1902.

1903.

AGREEMENT FOR THE LEASE TO THE UNITED STATES OF LANDS IN CUBA FOR COALING AND NAVAL STATIONS.

Signed by the President of Cuba February 16, 1903, and by the President of the United States February 23, 1903.

U. S. Treaties 1904, p. 225.

ARTICLES.

I. Lease of land.
II. Waters.
III. Jurisdiction.

1903.

EMBODYING THE PROVISIONS DEFINING THE FUTURE RELATIONS OF THE UNITED STATES WITH CUBA CONTAINED IN THE ACT OF CONGRESS, APPROVED MARCH 2, 1901, MAKING APPROPRIATION FOR THE ARMY.

Signed May 22, 1902; ratifications advised by the Senate, March 22, 1904; ratified by the President, June 25, 1904; ratified by Cuba June 20, 1904; ratifications exchanged at Washington July 1, 1904; proclaimed July 2, 1904.

33 Stats. at Large, pt. 2, p. 2248.

ARTICLES.

I. Treaty rights of Cuba with other powers.
II. Contraction of debts limited.
III. United States granted right to intervene, etc.
IV. Validation of military acts.
V. Extension of sanitary plans of cities.
VI. Title to Island of Pines.
VII. Naval stations for the United States.
VIII. Ratification.

1904.

SUPPLEMENTARY CONVENTION EXTENDING TIME FOR RATIFICATION OF TREATY OF MAY 22, 1903.

33 Stats. at Large, pt. 2, p. 2261.

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1904.

EXTRADITION.

Signed at Washington April 6, 1904; ratification advised by the Senate April 26, 1904; ratified by the President January 24, 1905; ratified by Cuba, January 16, 1905; ratifications exchanged at Washington January 31, 1905; proclaimed February 8, 1905.

33 Stats. at Large, pt. 2, p. 2265.

ARTICLES.

I. Reciprocal delivery of persons charged with crime.
II. Extraditable crimes.
III. Requisitions.
IV. Application for provisional arrest.
V. Neither country bound to deliver up its own citizens.
VI. No surrender for political offenses.
VII. No delivery if trial barred by limitations.
VIII. Trials to be only for offenses for which extradited.
IX. Disposal of articles seized with person.
X. Persons claimed by other countries.
XI. Expenses.
XII. Effect.

1904.

PROTOCOL TO EXTRADITION TREATY AMENDING SPANISH TEXT.

Signed at Washington, December 6, 1904; ratification advised by the Senate December 15, 1904; ratified by the President January 24, 1905; ratified by Cuba, January 16, 1905; ratifications exchanged at Washington January 31, 1905; proclaimed February 8, 1905.

33 Stats. at Large, pt. 2, p. 2273.

1903.

LEASE TO THE UNITED STATES BY CUBA OF LAND AND WATER FOR NAVAL OR COALING STATIONS IN GUANTANAMO AND BAHIA HONDA.

Signed July 2, 1903; approved by the President October 2, 1903; ratified by the President of Cuba August 17, 1903; ratifications exchanged October 6, 1903.

U. S. Treaties 1904, p. 227.

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ARTICLES.

I. Rental; acquirement of land; payment.
II. Survey.
III. Occupation.
IV. Fugitives.
V. Duties, etc.
VI. Jurisdiction.
VII. Ratification.

DENMARK.

1826.

CONVENTION OF FRIENDSHIP, COMMERCE AND NAVIGATION.[1]

Concluded April 26, 1826; ratification advised by the Senate May 4, 1826; ratified by the President May 6, 1826; ratifications exchanged August 10, 1826; proclaimed October 14, 1826. (Treaties and Conventions, 1889, p. 231.)

U. S. Treaties 1904, p. 229; 8 Stats. at Large, 340.

(This convention was abrogated by notice April 15, 1856, and renewed by the convention of April 11, 1857, except Article V.)

ARTICLES.

I. Most favored nation clause.
II. Freedom of trade.
III. Equality as to shipping.
IV. Import and export duties.
V. Sound and belts dues.
VI. Trade with Danish colonies.
VII. Property rights.
VIII. Consular officers.
IX. Consular privileges.
X. Consular exemptions.
XI. Duration.
XII. Ratification.

1830.

CLAIMS CONVENTION.

Concluded March 28, 1830; ratification advised by the Senate May 29, 1830; ratified by the President June 2, 1830; ratifications exchanged June 5, 1830; proclaimed June 5, 1830. (Treaties and Conventions, 1889, p. 235.)

U. S. Treaties 1904, p. 233; 8 Stats. at Large, 402.

By this convention Denmark renounced the claims of its subjects against the United States and agreed to pay an indemnity of

[1] See Bartram v. Robertson, 122 U. S. 116, 7 Sup. Ct. Rep. 1115, 30 L. ed. 1118; Thingvalla Line v. United States, 24 Ct. of Cl. 255.

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$650,000 for claims of United States citizens. The commission provided for met in Washington April 4, 1831, and held its last session March 23, 1833.

1857.

CONVENTION DISCONTINUING THE SOUND DUES.

Concluded April 11, 1857; ratifications advised by the Senate January 5, 1858; ratified by the President January 7, 1858; ratifications exchanged January 12, 1858; proclaimed January 13, 1858. (Treaties and Conventions, 1889, p. 238.)

U. S. Treaties 1904, p. 234; 11 Stats. at Large, 719.

ARTICLES.

I. Sound and belts dues abolished.
II. Lights, buoys and pilots.
III. Payment by the United States.
IV. Most favored nation privileges.
V. Convention of 1826 revived.
VI. Effect.
VII. Ratification.

1861.

CONSULAR CONVENTION.

Concluded July 11, 1861; ratification advised by the Senate July 17, 1861; ratified by the President August 25, 1861; ratifications exchanged September 18, 1861; proclaimed September 20, 1861. (Treaties and Conventions, 1889, p. 240.)

U. S. Treaties 1904, p. 236; 13 Stats. at Large, 605.

(This convention consisted of two additional articles to the general convention of commerce and navigation, 1826, renewed April 11, 1857, extending the powers of consuls.)

ARTICLES.

I. Authority of consuls over shipping disputes.
II. Deserters from ships; ratification.

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1872.

NATURALIZATION CONVENTION.

Concluded July 20, 1872; ratification advised by the Senate January 13, 1873; ratified by the President January 22, 1873; ratifications exchanged March 14, 1873; proclaimed April 15, 1873. (Treaties and Conventions, 1889, p. 241.)

U. S. Treaties 1904, p. 238; 17 Stats. at Large, 941.

ARTICLES.

I. Naturalization recognized.
II. Readmission to former status.
III. Renunciation of acquired status.
IV. Duration.
V. Ratification.

1886.

AGREEMENT FOR MUTUAL EXEMPTION OF VESSELS FROM READMEASUREMENT.

Signed at Washington, February 26, 1886.

U. S. Treaties 1904, p. 240.

1888.

AGREEMENT SUBMITTING CLAIM OF CARLOS BUTTERFIELD & CO. TO ARBITRATION.

Concluded December 6, 1888; ratification advised by the Senate February 11, 1889; ratified by the President April 23, 1889; ratifications exchanged May 23, 1889; proclaimed May 24, 1889.

U. S. Treaties 1904, p. 240; 26 Stats. at Large, 1490.

By this agreement the claim of Butterfield & Co. for indemnity for seizure of vessels by the Danish Colonial authorities of St Thomas, West Indies, was referred to Sir Edmund Monson, by whom it was disallowed.

1892.

TRADEMARK CONVENTION.

Concluded June 15, 1892; ratification advised by the Senate July 21, 1892; ratified by the President July 29, 1892; ratifications exchanged September 28, 1892; proclaimed October 12, 1892.

U. S. Treaties 1904, p. 241; 27 Stats. at Large, 963.

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ARTICLES.

I. Reciprocal rights.
II. Formalities.
III. Duration.
IV. Ratification.

1902.

EXTRADITION TREATY.

Concluded January 6, 1902; ratification advised by Senate January 30, 1902; ratified by President February 26, 1902; ratifications exchanged April 16, 1902; proclaimed April 17, 1902.

U. S. Treaties 1904, p. 242; 32 Stats. at Large, 1906.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Procedure.
IV. Provisional detention.
V. Nondelivery of citizens.
VI. Political offenses.
VII. Limitations.
VIII. Prior offenses.
IX. Property seized with fugitive.
X. Persons claimed by other countries.
XI. Expenses.
XII. Ratification; duration.

1905.

EXTRADITION—SUPPLEMENTARY TREATY BETWEEN THE UNITED STATES AND DENMARK FOR THE EXTRADITION OF CRIMINALS.

Signed at Washington, November 6, 1905; ratification advised by the Senate, December 7, 1905; ratified by the President, February 13, 1906; ratified by Denmark, December 14, 1905; ratifications exchanged at Washington, February 19, 1906; proclaimed February 19, 1906.

Treaties and Proclamations, 2887; 34 Stats. at Large, part 3.

ARTICLES.

I. Extradition provisions extended to island possession and colonies.
II. Additional extraditable crime.
III. Exchange of ratifications.

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DOMINICAN REPUBLIC.

1867.

CONVENTION OF AMITY, COMMERCE AND NAVIGATION, AND EXTRADITION.

Concluded February 8, 1867; ratification advised by the Senate March 20, 1867; ratified by the President July 31, 1867; ratifications exchanged October 5, 1867; proclaimed October 24, 1867. (Treaties and Conventions, 1889, p. 244.)

U. S. Treaties 1904, p. 246; 15 Stats. at Large, 473.

This convention of thirty-two articles terminated January 13, 1898, by notice from the Dominican government.

ECUADOR.

1839.

TREATY OF PEACE, FRIENDSHIP, NAVIGATION AND COMMERCE.

Concluded June 13, 1839; ratification advised by the Senate July 15, 1840; ratified by the President July 31, 1840; ratifications exchanged April 9, 1842; proclaimed September 23, 1842. (Treaties and Conventions, 1889, p. 255.)

U. S. Treaties 1904, p. 247; 8 Stats. at Large, 534.

This treaty of thirty-five articles was abrogated August 25, 1892, by notice from the Ecuadorian government.

1862.

CLAIMS CONVENTION.

Concluded November 25, 1862; ratification advised by the Senate January 28, 1863; ratified by the President February 13, 1863; ratifications exchanged July 27, 1864; proclaimed September 8, 1864. (Treaties and Conventions, 1889, p. 265.)

U. S. Treaties 1904, p. 247; 13 Stats. at Large, 631.

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Under this convention of seven articles the commission of two members and an arbitrator met at Guyaquil, August 22, 1864, and terminated its session August 17, 1865. The amount awarded against Ecuador was $94,799.56.

1872.

NATURALIZATION CONVENTION.

Concluded May 6, 1872; ratification advised by the Senate May 23, 1872; ratified by the President May 25, 1872; ratifications exchanged November 6, 1873; proclaimed November 24, 1873. (Treaties and Conventions, 1889, p. 267.)

U. S. Treaties 1904, p. 247; 18 Stats. at Large, Treaties, 69.

This convention of seven articles was abrogated August 25, 1892, upon notice given by the Ecuadorian government.

1872.

EXTRADITION CONVENTION.

Concluded June 28, 1872; ratification advised by the Senate January 6, 1873; ratified by the President January 10, 1873; ratifications exchanged November 12, 1873; proclaimed December 24, 1873. (Treaties and Conventions, 1889, p. 269.)

U. S. Treaties 1904, p. 248; 18 Stats. at Large, Treaties, 72.

ARTICLES.

I. Persons to be delivered.
II. Extraditable crimes.
III. Political offenses, etc.
IV. Persons under arrest in country where found.
V. Procedure.
VI. Expenses.
VII. Duration; ratification.

1894.

CONVENTION FOR ARBITRATION OF CLAIM OF JULIO R. SANTOS.

Concluded February 28, 1893; proclaimed November 7, 1894.

28 Stats. at Large, 1205.

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EGYPT.

1884.

COMMERCIAL AGREEMENT.

Concluded November 16, 1884; ratification advised by the Senate March 18, 1885; ratified by the President May 7, 1885; proclaimed May 7, 1885. (Treaties and Conventions, 1889, p. 272.)

U. S. Treaties 1904, p. 251; 24 Stats. at Large, 1004.

ETHIOPIA.

1903.

TREATY TO REGULATE COMMERCIAL RELATIONS.

Signed December 27, 1903; ratification advised by the Senate March 12, 1904; ratified by the President March 17, 1904; proclaimed September 30, 1904.

U. S. Treaties 1904, p. 956; 33 Stats. at Large, 2254.

ARTICLES.

I. Freedom to travel and transact business.
II. Security of persons and property.
III. Customs duties, imposts, jurisdiction.
IV. Use of means of transportation.
V. Representatives of governments.
VI. Duration.
VII. Ratification.

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FRANCE.

1778.

TREATY OF AMITY AND COMMERCE.[1]

Concluded at Paris February 6, 1778; ratified by Congress May 4, 1778. (Treaties and Conventions, 1889, p. 296.)

U. S. Treaties 1904, p. 255; 8 Stats. at Large, 12.

This treaty, abrogated by the act of Congress July 7, 1798, consisted of thirty-one articles, and in many important respects formed the basis of subsequent treaties of commerce.

1778.

TREATY OF ALLIANCE.

Concluded at Paris February 6, 1778; ratified by Congress May 4, 1778. (Treaties and Conventions, 1889, p. 307.)

U. S. Treaties 1904, p. 255; 8 Stats. at Large, 6.

This treaty, consisting of twelve articles, provided for an alliance to carry on the war with Great Britain, for the sovereignty of the lands to be acquired as the result of the war, and the guaranty of

[1] See Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; Soulard v. United States, 4 Pet. 511, 7 L. ed. 938; Delasus v. United States, 9 Pet. 117, 9 L. ed. 71; New Orleans v. De Armas, 9 Pet. 224, 9 L. ed. 109; Smith v. United States, 10 Pet. 326, 9 L. ed. 442; New Orleans v. United States, 10 Pet. 662, 9 L. ed. 573; Strother v. Lucas, 12 Pet. 410, 9 L. ed. 1137; Garcia v. Lee, 12 Pet. 511, 9 L. ed. 1176; Keene v. Whitaker, 14 Pet. 170, 10 L. ed. 404; Chouteau v. Eckhart, 2 How. 344, 11 L. ed. 293; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; McDonogh v. Millaudon, 3 How. 693, 11 L. ed. 787; United States v. King, 3 How. 773, 11 L. ed. 824; United States v. Reynes, 9 How. 127, 13 L. ed. 74; Davis v. Police Jury of Concordia, 9 How. 280, 13 L. ed. 138; United States v. D'Auterive, 10 How. 609, 13 L. ed. 560; United States v. Philadelphia and New Orleans, 11 How. 609, 13 L. ed. 834; United States v. Turner, 11 How. 663, 13 L. ed. 857; United States v. Lynde's Heirs, 11 Wall. 632, 20 L. ed. 230; Slidell v. Grandjean, 111 U. S. 412, 4 Sup. Ct. Rep. 475, 28 L. ed. 321; Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. Rep. 407, 28 L. ed. 908; Josephs v. United States, 1 Ct. of Cl. 197, 2 Ct. of Cl. 586; Gray v. United States, 21 Ct. of Cl. 340; "The Ship Tom," 29 Ct. of Cl. 68; Iowa v. Rood, 187 U. S. 87, 23 Sup. Ct. Rep. 49, 47 L. ed. 86.

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the French possessions in America and the dominions of the United States.

An additional article was agreed to at the same time reserving to the King of Spain the right to participate in the two treaties. This additional article was also ratified by Congress May 4, 1778.

By an act of Congress approved July 7, 1798, the treaties with France then in force were abrogated.

1782.

CONTRACT FOR THE REPAYMENT OF LOANS MADE BY THE KING OF FRANCE.

Concluded July 16, 1782; ratified by Congress January 22, 1783.
(Treaties and Conventions, 1889, p. 310.)

U. S. Treaties 1904, p. 255; 8 Stats. at Large, 614.

Under this contract the United States pledged itself to pay in twelve equal annual installments of 1,500,000 livres each the amount of the indebtedness to the King of France, which was 18,000,000 livres. It was also agreed to pay the loan obtained from Holland of 10,000,000 livres in ten annual payments.

1783.

CONTRACT FOR A NEW LOAN AND THE REPAYMENT OF THE OLD LOANS MADE BY THE KING OF FRANCE.

Concluded February 25, 1783; ratified by Congress October 31, 1783
(Treaties and Conventions, 1889, p. 314.)

U. S. Treaties 1904, p. 256; 17 Stats. at Large, 797.

By this agreement 6,000,000 livres were to be loaned the United States from the royal treasury in the course of the year, and to be repaid in six annual installments beginning in 1797. It was also agreed that the payments under the contract of 1782 should commence in 1787.

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1788.

CONSULAR CONVENTION.

Concluded November 14, 1788; ratification advised by the Senate July 29, 1789; ratified by the President September 9, 1789; ratifications exchanged January 6, 1790 (dated January 1, 1790). (Treaties and Conventions, 1889, p. 316.)

U. S. Treaties 1904, p. 256; 8 Stats. at Large, 106.

This convention of sixteen articles was abrogated by the act of July 7, 1798.

1800.

TREATY OF PEACE, COMMERCE, AND NAVIGATION.

Concluded September 30, 1800; ratification advised by the Senate with amendments February 3, 1801; ratified by the President February 18, 1801; ratified by the first consul of France on condition of acceptance of amendments proposed by him July 31, 1801; ratifications exchanged July 31, 1801; proclaimed December 21, 1801. (Treaties and Conventions, 1889, p. 322.)

U. S. Treaties 1904, p. 256; 8 Stats. at Large, 178.

This treaty consisted of twenty-seven articles and expired by its own limitations July 31, 1809.

See United States v. The Peggy, 1 Cranch, 103, 2 L. ed. 49; Cherac v. Cherac, 2 Wheat. 259, 4 L. ed. 234; De Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. Rep. 295, 33 L. ed. 642; Gray v. United States, 21 Ct. of Cl. 340; Cushing v. United States, 22 Ct. of Cl. 1; Hooper v. United States, 22 Ct. of Cl. 408; "The Schooner Jane," 23 Ct. of Cl. 226; "The Ship Tom," 29 Ct. of Cl. 68.

1803.

TREATY FOR THE CESSION OF LOUISIANA.

Concluded April 30, 1803; ratification advised by the Senate October 20, 1803; ratified by the President October 21, 1803; ratifications exchanged October 21, 1803; proclaimed October 21, 1803. (Treaties and Conventions, 1889, p. 331.)

U. S. Treaties 1904, p. 257; 8 Stats. at Large, 200.

(This treaty, although executed, is mentioned on account of its historical value in defining the extent of the cession.)

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ARTICLES.

I. Cession of the colony of Louisiana.
II. Extent of cession.
III. Citizenship to inhabitants.
IV. Transfer of territory.
V. Assumption of possession.
VI. Treaties with Indians.
VII. Privileges to French and Spanish ships.
VIII. Most favored nation clause.
XI. Approval of other conventions.
X. Ratification.

See Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; Soulard v. United States, 4 Pet. 511, 7 L. ed. 938; Smith v. United States, 10 Pet. 326, 9 L. ed. 442; New Orleans v. United States, 10 Pet. 662, 9 L. ed. 573; Strother v. Lucas, 12 Pet. 410, 9 L. ed. 1137; Garcia v. Leo, 12 Pet. 511, 9 L. ed. 1176; Keene v. Whitaker, 14 Pet. 470, 10 L. ed. 404; Chouteau v. Eckhart, 2 How. 344, 11 L. ed. 293; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; McDonogh v. Millaudon, 3 How. 693, 11 L. ed. 787; United States v. King, 3 How. 773, 11 L. ed. 824; United States v. Reynes, 9 How. 127, 13 L. ed. 74; Davis v. Police Jury of Concordia, 9 How. 280, 13 L. ed. 138; United States v. D'Auterive, 10 How. 609, 13 L. ed. 560; United States v. Philadelphia and New Orleans, 11 How. 609, 13 L. ed. 834; United States v. Turner, 11 How. 663, 13 L. ed. 857; United States v. Lynde's Heirs, 11 Wall. 632, 20 L. ed. 230; Slidell v. Granjean, 111 U. S. 412, 4 Sup. Ct. Rep. 475, 28 L. ed. 321; Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. Rep. 407, 28 L. ed. 908; Josephs v. United States, 1 Ct. of Cl. 197, 2 Ct. of Cl. 586; Gray v. United States, 21 Ct. of Cl. 340; "The Ship Tom," 29 Ct. of Cl. 68; Iowa v. Rood, 187 U. S. 87, 23 Sup. Ct. Rep. 49, 47 L. ed. 86.

1803.

CONVENTION FOR THE PAYMENT OF THE PURCHASE OF LOUISIANA.

Concluded April 30, 1803; ratification advised by the Senate October 20, 1803; ratified by the President October 21, 1803; ratifications exchanged October 21, 1803; proclaimed October 21, 1803. (Treaties and Conventions, 1889, p. 334.)

U. S. Treaties 1904, p. 262; 8 Stats. at Large, 206.

Under this convention a stock amounting to $11,250,000 was created to be paid, with six per cent interest, in annual payments of not less than $3,000,000, the first payment to commence after fifteen years from the exchange of ratifications. (See U. S. Stats., Vol. 2, p. 245.)

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1803.

CLAIMS CONVENTION.

Concluded April 30, 1803; ratification advised by the Senate October 20, 1803; ratified by the President October 21, 1803; ratifications exchanged October 21, 1803; proclaimed October 21. 1803. (Treaties and Conventions, 1889, p. 335.)

U. S. Treaties 1904, p. 262; 8 Stats. at Large, 208.

The convention provided for the payment of claims of United States citizens against France, not to exceed 60,000,000 francs. The commission organized under the convention held its first meeting July 5, 1803, and adjourned December 1, 1804.

1822.

CONVENTION OF NAVIGATION AND COMMERCE.

Concluded June 24, 1822; ratification advised by the Senate January 31, 1823; ratified by the President February 12, 1823; ratifications exchanged February 12, 1823; proclaimed February 12, 1823. (Treaties and Conventions, 1889, p. 343.)

U. S. Treaties 1904, p. 263; 8 Stats. at Large, 278

ARTICLES.

I. Extra duties by American vessels.
II. Extra duties by French vessels.
III. Transit and re-exportation.
IV. Ton described.
V. Shipping charges.
VI. Deserters from ships.
VII. Duration; reduction of extra duties.
VIII. Ratification.
Separate articles. Refund of extra duties.

1831.

CONVENTION AS TO CLAIMS AND DUTIES ON WINES AND COTTON.

Concluded July 4, 1831; ratification advised by the Senate January 27, 1832; ratified by the President February 2, 1832; ratifications exchanged February 2, 1832; proclaimed July 13. 1832. (Treaties and Conventions, 1889, p. 345.)

U. S. Treaties 1904, p. 265; 8 Stats. at Large, 430.

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By this convention France agreed to pay to the United States in settlement of all claims of United States citizens 25,000,000 francs, and the United States agreed to pay in settlement of claims of the French Government and people 1,500,000 francs. Other claims not included in the provisions of the treaty were to be brought before the appropriate authorities in either country.

1843.

EXTRADITION CONVENTION.

Concluded November 9, 1843; ratification advised by the Senate February 1, 1844; ratified by the President February 2, 1844; ratifications exchanged April 12, 1844; proclaimed April 13, 1844. (Treaties and Conventions, 1899, p. 348.)

U. S. Treaties 1904, p. 266; 8 Stats. at Large, 580.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Delivery.
IV. Expenses.
V. Political crimes, etc.
VI. Duration; ratification.

See In re Metzger, 5 How. 176, 12 L. ed. 104.

1845.

ADDITIONAL ARTICLE TO EXTRADITION CONVENTION.

Concluded February 24, 1845; ratification advised by the Senate March 12, 1845; ratified by the President May 5, 1845; ratifications exchanged June 21, 1845; proclaimed July 24, 1845. (Treaties and Conventions, 1889, p. 349.)

U. S. Treaties 1904, p. 267; 8 Stats. at Large, 617.

1853.

CONSULAR CONVENTION.

Concluded February 23, 1853; ratification advised by the Senate with amendments March 29, 1853; ratified by the President April 1, 1853; ratifications exchanged August 11, 1853; proclaimed August 12, 1853. (Treaties and Conventions, 1889, p. 350.)

U. S. Treaties 1904, p. 268; 10 Stats. at Large, Treaties, 114.

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ARTICLES.

I. Officers recognized; exequaturs.
II. Privileges and immunities.
III. Inviolability of consulates.
IV. Complaints to authorities.
V. Agencies.
VI. Notarial authority.
VII. Property rights.
VIII. Settlement of shipping disputes.
IX. Deserters from ships.
X. Authority as to shipping.
XI. Shipwrecks.
XII. Most favored nation privileges.
XIII. Duration; ratification.

See Prevost v. Grenaux, 19 How. 1, 15 L. ed. 572; De Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. Rep. 295, 33 L. ed. 642; Bahuaud v. Bize, 105 Fed. 487.

1858.

Additional Article to Extradition Convention.

Concluded February 10, 1858; ratification advised by the Senate, with amendment, June 15, 1858; ratified by the President June 28, 1858; ratifications exchanged February 12, 1859; proclaimed February 14, 1859. (Treaties and Conventions, 1889, p. 354.)

U. S. Treaties 1904, p. 273; 11 Stats. at Large, 741.

It is agreed between the High Contracting Parties that the provisions of the treaties for the mutual extradition of criminals between the United States of America and France, of November 9th, 1843, and February 24th, 1845, and now in force between the two Governments, shall extend not only to persons charged with the crimes therein mentioned, but also to persons charged with the following crimes, whether as principals, accessories or accomplices, namely, forging or knowingly passing or putting in circulation counterfeit coin or bank notes or other paper current as money, with intent to defraud any person or persons—Embezzlement by any person or persons hired or salaried to the detriment of their Employers, when these crimes are subject to infamous punishment.

In witness whereof the respective Plenipotentiaries have signed the present article in triplicate, and have affixed thereto the seal of their arms.

Done at Washington, the tenth of February, 1858.

LEW CASS. [SEAL.]
SARTIGES. [SEAL.]

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1869.

TRADEMARK CONVENTION.

Concluded April 16, 1869; ratification advised by the Senate April 19, 1869; ratified by the President April 30, 1869; ratifications exchanged July 3, 1869; proclaimed July 6, 1869. (Treaties and Conventions, 1889, p. 355.)

U. S. Treaties 1904, p. 273; 16 Stats. at Large, 771.

ARTICLES.

I. Protection of trademarks.
II. Registration.
III. Duration.
IV. Ratification.

See Lacroix v. Sarrazin, 4 Woods, 174, 15 Fed. 489; "La Republique Francaise" v. Schultz, 57 Fed. 37; In re Balensi, 120 Fed. 864.

1880.

CLAIMS CONVENTION.

Concluded January 15, 1880; ratification advised by the Senate March 29, 1880; ratified by the President April 3, 1880; ratifications exchanged June 23, 1880; proclaimed June 25, 1880. (Treaties and Conventions, 1889, p. 356.)

U. S. Treaties 1904, p. 275; 21 Stats. at Large, 673.

By this convention of twelve articles, claims of United States citizens against France arising out of the French-Mexican war and the war with Germany, and claims of French citizens against the United States arising out of the civil war, were referred to three commissioners. The commission met in Washington, November 5, 1880, and adjourned March 31, 1884. Awards against the United States amounted to $625,566.35, and against France to 13,659 francs, 14 centimes.

See Burthe v. Denis, 133 U. S. 514, 10 Sup. Ct. Rep. 335, 33 L. ed. 768.

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1882.

CLAIMS CONVENTION.

Concluded July 19, 1882; ratification advised by the Senate August 8, 1882; ratified by the President December 28, 1882; ratifications exchanged December 29, 1882; proclaimed December 29, 1882. (Treaties and Conventions, 1889, p. 360.)

U. S. Treaties 1904, p. 275; 22 Stats. at Large, 983.

This convention extended the term of the claims commission under the convention of 1880 until July 1, 1883.

1883.

CLAIMS CONVENTION.

Concluded February 8, 1883; ratification advised by the Senate with an amendment February 21, 1883; ratified by the President April 3, 1883; ratifications exchanged June 25, 1883; proclaimed June 25, 1883. (Treaties and Conventions, 1889, p. 361.)

U. S. Treaties 1904, p. 275; 23 Stats. at Large, 728.

The term of the claims commission under the convention of 1880 was further extended by this convention to April 1, 1884.

1898.

RECIPROCAL COMMERCIAL AGREEMENT.

Concluded May 28, 1898; proclaimed May 30, 1898; in effect June 1, 1898.

U. S. Treaties 1904, p. 276; 30 Stats. at Large, 1774.

ARTICLES.

I. Concessions by France.
II. Concessions by United States.
III. Effect; duration.

1902.

AMENDATORY RECIPROCAL COMMERCIAL AGREEMENT WITH FRANCE.

Concluded August 20, 1902; proclaimed August 22, 1902.

U. S. Treaties 1904, p. 278.

ARTICLES.

I. Algeria; Porto Rico.
II. Effect; duration.

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RELATIONS IN TUNIS.

Signed March 15, 1904; ratification advised by the Senate March 24, 1904; ratified by the President May 6, 1904; ratifications exchanged May 7, 1904; proclaimed May 9, 1904.

U. S. Treaties 1904, p. 949.

ARTICLES.

I. Renunciation of treaties with Tunis, etc.
II. Ratification.

GERMAN EMPIRE.

The formation of the German Empire in 1871 by the consolidation of the North German Union, etc., has in some instances abrogated the treaties entered into with the independent German governments now embraced in the Empire, but reference is here given to all the separate governments with which treaties have been concluded.

See Baden, Bavaria, Bremen, Brunswick and Lüneberg, Hanover, Hanseatic Republics, Hesse, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Nassau, North German Union, Oldenburg, Prussia, Saxony, Schaumburg-Lippe, Württemberg.

1871.

CONSULAR CONVENTION.

Concluded December 11, 1871; ratification advised by the Senate January 18, 1872; ratified by the President January 26, 1872; ratifications exchanged April 29, 1872; proclaimed June 1, 1872. (Treaties and Conventions, 1889, p. 363.)

U. S. Treaties 1904, p. 279; 17 Stats. at Large, 921.

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ARTICLES.

I. Consular offices.
II. Exequaturs.
III. Privileges and immunities.
IV. Arms and flags.
V. Inviolability of consulates.
VI. Temporary vacancies.
VII. Consular agencies.
VIII. Communications with authorities.
IX. Notarial authority.
X. Property of decedents.
XI. Effects of deceased sailors and passengers.
XII. Authority over ships.
XIII. Disputes between officers and crews of ships.
XIV. Deserters from ships.
XV. Damages to vessels at sea.
XVI. Shipwrecks.
XVII. Trademark protection.
XVIII. Duration; ratification.
Protocol. As to meaning of "property," and "deceased citizens."

See The Burchard, 42 Fed. 608; Richter v. Reynolds, 59 Fed. 577, 8 C. C. A. 220.

1892.

COPYRIGHT AGREEMENT.

Signed January 15, 1892; proclaimed April 15, 1892.

27 Stats. at Large, 1021.

ARTICLES.

I. American citizens to have copyright in German Empire.
II. German subjects to have copyright in the United States.
III. Duration.

1900.

RECIPROCAL COMMERCIAL ARRANGEMENT WITH GERMANY.

Concluded July 10, 1900; proclaimed July 13, 1900.

U. S. Treaties 1904, p. 285; 31 Stats. at Large, 1935. The proclamation of the President is found in 31 Stats. at Large, 1978.

ARTICLES.

I. Concessions by United States.
II. Concessions by Germany.
III. Effect; duration.

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GREAT BRITAIN.

(UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.)

The treaties leading to the establishment of peace between the United States and Great Britain, which formed such an important factor in settling the territory and establishing the Government of the United States, are referred to, in the treaty volumes although many of the articles have been abrogated subsequent wars or modified by later conventions.

1782.

PROVISIONAL TREATY OF PEACE.

Concluded at Paris, November 30, 1782; proclamation ordered by Congress April 11, 1783. (Treaties and Conventions, 1889, p. 370.)

U. S. Treaties 1904, p. 287; 8 Stats. at Large, 54.

ARTICLES.

I. Independence acknowledged.
II. Boundaries.
III. Fishery rights.
IV. Recovery of debts.
V. Restitution of estates.
VI. Confiscations and prosecutions to cease.
VII. Withdrawal of British armies.
VIII. Navigation of the Mississippi River.
IX. Restoration of territory.
Separate article. Boundary of West Florida.

1783.

ARMISTICE DECLARING A CESSATION OF HOSTILITIES.

Concluded January 20, 1783.

U. S. Treaties 1904, p. 291; 8 Stats. at Large, 58.

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1783.

DEFINITIVE TREATY OF PEACE.[1]

Concluded at Paris September 3, 1783; ratified by Congress January 14, 1784; proclaimed January 14, 1784. (Treaties and Conventions, 1889, p. 375.)

U. S. Treaties 1904, p. 292; 8 Stats. at Large, 80.

ARTICLES.

I. Independence acknowledged.
II. Boundaries.
III. Fishery rights.
IV. Recovery of debts.
V. Restitution of estates.
VI. Confiscations and prosecutions to cease.
VII. Withdrawal of British armies.
VIII. Navigation of the Mississippi River.
IX. Restoration of territory.
X. Ratification.

[1] Republica v. Gordon, 1 Dall. 233, 1 L. ed. 115; Georgia v. Brailsford, 3 Dall. 1, 1 L. ed. 483; Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568; Hunter v. Fairfax, 3 Dall. 305, 1 L. ed. 613; Hopkirk v. Bell, 3 Cranch, 454, 2 L. ed. 497, 4 Cranch, 164, 2 L. ed. 583; M'Ilvaine v. Coxe's Lessee, 4 Cranch, 209, 2 L. ed. 598; Higginson v. Mein, 4 Cranch, 415, 2 L. ed. 664; Owings v. Norwood's Lessee, 5 Cranch, 344, 3 L. ed. 120; Smith v. Maryland, 6 Cranch, 286, 3 L. ed. 225; Fairfax v. Hunter, 7 Cranch, 603, 3 L. ed. 453; Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. ed. 97; Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613; Blight's Lessee v. Rochester, 7 Wheat. 535, 5 L. ed. 516; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464, 5 L. ed. 662; Harcourt v. Gaillard, 12 Wheat. 523, 6 L. ed. 716; Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666; Carver v. Jackson, 4 Pet. 1, 7 L. ed. 761; United States v. Repentigny, 5 Wall. 211, 18 L. ed. 627; Hylton's Lessee v. Brown, 1 Wash. C. C. 298, 343, Fed. Cas. No. 6981; Gordon's Lessee v. Kerr, 1 Wash. C. C. 322, Fed. Cas. No. 5611; Fisher v. Harnden, 1 Paine C. C. 55, Fed. Cas. No. 4819; Jones v. Walker, 2 Paine C. C. 688, Fed. Cas. No. 7507; Dunlop v. Alexander, 1 Cranch C. C. 498, 3 Fed. Cas. No. 4166.

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1794.

TREATY OF AMITY, COMMERCE AND NAVIGATION.[1]

(JAY TREATY.)

Concluded November 19, 1794; ratification advised by the Senate with amendment June 24, 1795; ratified by the President; ratification exchanged October 28, 1795; proclaimed February 29, 1796. (Treaties and Conventions, 1889, p. 379.)

U. S. Treaties 1904, p. 297; 8 Stats. at Large, 116.

This treaty consisted of twenty-eight articles and an additional article relating to the West Indian trade. Articles XI to XXVII expired by their own limitation October 28, 1807, and the entire treaty terminated by the war declared June 18, 1812. The commission under Article V made a declaration, October 25, 1798, as to the true St. Croix River named in the treaty. The commission under Article VI, to consider claims arising from obstructions of judicial remedies, met at Philadelphia May 29, 1797, and their meetings finally suspended July 31, 1799, owing to disagreements. By the treaty of 1802, $2,664,000 was provided to be paid to Great Britain in settlement of these claims. The commission under Article VII, to consider claims arising from illegal captures, met at London August 16, 1796, and suspended its sessions July 20, 1799. The meetings were resumed under the treaty of 1802, and the final meeting was held February 4, 1804. The awards against the United States amounted to $143,428.14, and against Great Britain to $11,656,000.

[1] See Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185, 2 L. ed. 591; Fairfax v. Hunter, 7 Cranch, 603, 3 L. ed. 453; Harden v. Fisher, 1 Wheat. 300, 4 L. ed. 96; Jackson v. Clarke, 3 Wheat. 1, 4 L. ed. 319; Craig v. Radford, 3 Wheat. 594, 4 L. ed. 467; Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613; Blight's Lessee v. Rochester, 7 Wheat. 535, 5 L. ed. 516; Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464, 5 L. ed. 662; Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666; Forsyth v. Reynolds, 15 How. 358, 14 L. ed. 729; United States v. Wash, Bee's Adm. Rep. 267; Fisher v. Harnden, 1 Paine C. C. 55, Fed. Cas. No. 4819; Jackson v. Porter, 1 Paine C. C. 457, Fed. Cas. No. 7143; Society for the Propagation of the Gospel v. Wheeler, 2 Gallison, 105, Fed. Cas. No. 13,156; Gray v. United States, 21 Ct. of Cl. 340.

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1796.

ARTICLE EXPLANATORY TO ARTICLE III, TREATY OF 1794.

Concluded May 4, 1796; ratification advised by the Senate May 9, 1796. (Treaties and Conventions, 1889, p. 395.)

U. S. Treaties 1904, p. 297; 8 Stats. at Large, 130.

This article related to the passage of Indians into the territories of both nations. The treaty of 1794 terminated by the declaration of the war of 1812.

1798.

ARTICLE EXPLANATORY TO ARTICLE V, TREATY OF 1794.

Concluded March 15, 1798; ratification advised by the Senate June 5, 1798. (Treaties and Conventions, 1889, p. 396.)

U. S. Treaties 1904, p. 297; 8 Stats. at Large, 131.

This article authorized the commission under Article V of the treaty of 1794 to designate the source of the St. Croix River. The declaration was made October 25, 1798.

1802.

CONVENTION FOR PAYMENT OF INDEMNITIES AND SETTLEMENT OF DEBTS.

Concluded January 8, 1802; ratification advised by the Senate April 26, 1802; ratified by the President April 27, 1802; ratifications exchanged July 15, 1802; proclaimed April 27, 1802. (Treaties and Conventions, 1889, p. 398.)

U. S. Treaties 1904, p. 298; 8 Stats. at Large, 190.

This convention of five articles provides for the payment to Great Britain of £600,000 in full for the claims submitted under Article VI of the treaty of 1794, and for the continuation of the commission under Article VII, and it was agreed that the awards should be paid in three annual installments. It was also agreed that creditors of either country should meet with no impediment in the collection of their debts.

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1814.

TREATY OF PEACE AND AMITY.

(TREATY OF GHENT.)

Concluded at Ghent December 24, 1814; ratification advised by the Senate February 16, 1815; ratified by the President February 17, 1815; ratifications exchanged February 17, 1815; proclaimed February 18, 1815. (Treaties and Conventions, 1889, p. 399.)

U. S. Treaties 1904, p. 298; 8 Stats. at Large, 218.

ARTICLES.

I. Peace declared; restoration of territory, archives, etc.
II. Cessation of hostilities.
III. Release of prisoners.
IV. Boundaries; determination of northeastern.
V. Boundaries; determination of northern, from St. Croix River to St. Lawrence River.
VI. Boundaries; determination of northern, from St. Lawrence River to Lake Superior.
VII. Boundaries; determination of northern, from Lake Huron to Lake of the Woods.
VIII. Powers of boundary commissions, etc.
IX. Cessation of hostilities with Indians.
X. Abolition of slave trade.
XI. Ratification.

1815.

CONVENTION OF COMMERCE AND NAVIGATION.

Concluded July 3, 1815; ratification advised by the Senate, subject to exception as to the island of St. Helena, December 19, 1815; ratified by the President December 22, 1815; ratifications exchanged December 22, 1815; proclaimed December 22, 1815. (Treaties and Conventions, 1889, p. 410.)

U. S. Treaties 1904, p. 308; 8 Stats. at Large, 228.

This convention was continued in force for ten years by Article IV, treaty of 1818, p. 312, and indefinitely extended by convention of August 6, 1827.

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ARTICLES.

I. Freedom of commerce and navigation.
II. Import and export duties; shipping; trade with British possessions in West Indies and North America.
III. Trade with British East Indies, etc.
IV. Consuls.
V. Duration; ratification.
Declaration. Vessels excluded from island of St. Helena.

1817.

ARRANGEMENT BETWEEN THE UNITED STATES AND GREAT BRITAIN, BETWEEN RICHARD RUSH, ACTING AS SECRETARY OF THE DEPARTMENT OF STATE, AND CHARLES BAGOT, HIS BRITANNIC MAJESTY'S ENVOY EXTRAORDINARY, ETC.

Concluded in April, 1817; advised and consented to by the Senate April 16, 1818; proclaimed April 28, 1818.

U. S. Treaties 1904, p. 312; 8 Stats. at Large, 231.

The naval force to be maintained upon the American lakes, by His Majesty and the Government of the United States, shall henceforth be confined to the following vessels on each side; that is—

On Lake Ontario, to one vessel not exceeding one hundred tons burden, and armed with one eighteen-pound cannon.

On the upper lakes, to two vessels, not exceeding like burden each, and armed with like force.

On the waters of Lake Champlain, to one vessel not exceeding like burden, and armed with like force.

All other armed vessels on these lakes shall be forthwith dismantled, and no other vessels of war shall be there built or armed.

If either party should hereafter be desirous of annulling this stipulation, and should give notice to that effect to the other party, it shall cease to be binding after the expiration of six months from the date of such notice.

The naval force so to be limited shall be restricted to such services as will, in no respect, interfere with the proper duties of the armed vessels of the other party.

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1818.

CONVENTION RESPECTING FISHERIES, BOUNDARY AND THE RESTORATION OF SLAVES.[1]

Concluded October 20, 1818; ratification advised by the Senate January 25, 1819; ratified by the President January 28, 1819; ratifications exchanged January 30, 1819; proclaimed January 30, 1819. (Treaties and Conventions, 1889, p. 415.)

U. S. Treaties 1904, p. 312; 8 Stats. at Large, 248.

ARTICLES.

I. Fisheries.
II. Boundary from the Lake of the Woods to the Stony Mountains.
III. Country west of the Stony Mountains.
IV. Commercial convention extended.
V. Claims for restitution of slaves.
VI. Ratification.

1822.

CLAIMS CONVENTION.

Concluded July 12, 1822; ratification advised by the Senate January 3, 1823; ratified by the President, January, 1823; ratifications exchanged January 10, 1823; proclaimed January 11, 1823. (Treaties and Conventions, 1889, p. 418.)

U. S. Treaties 1904, p. 315; 8 Stats. at Large, 282.

The Emperor of Russia having decided the United States to be entitled, under Article I of the Treaty of Ghent, to the restitution of slaves carried away by the British forces, this convention provided for a commission to ascertain the average value of the slaves and to decide upon the claims for indemnity. The commission met in Washington August 25, 1823, and having fixed the average value of the slaves, on September 13, 1824, met to consider the claims. Being unable to agree, a new convention was negotiated November 13, 1826, and the commission was dissolved March 26, 1827.

[1] See McKay v. Campbell, 2 Saw. 118, Fed. Cas. No. 8840.

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1826.

CONVENTION RELATIVE TO INDEMNITY FOR SLAVES.

Concluded November 13, 1826; ratification advised by the Senate December 26, 1826; ratified by the President December 27, 1826; ratifications exchanged February 6, 1827; proclaimed March 19, 1827. (Treaties and Conventions, 1889, p. 424.)

U. S. Treaties 1904, p. 316; 8 Stats. at Large, 344.

By this convention Great Britain agreed to pay $1,204,960 as indemnity for slaves carried away. By act of March 2, 1827 (U. S. Stats., Vol. 4, p. 219), a commission was authorized to settle the claims. The first meeting of the commission was held July 10, 1827, and the last August 31, 1828.

1827.

CONVENTION CONTINUING IN FORCE ARTICLE III, TREATY OF 1818.

Concluded August 6, 1827; ratification advised by the Senate February 5, 1828; ratified by the President February 21, 1828; ratifications exchanged April 2, 1828; proclaimed May 15, 1828. (Treaties and Conventions, 1889, p. 426.)

U. S. Treaties 1904, p. 316; 8 Stats. at Large, 360.

This convention provided for the joint temporary occupancy of the territory west of the line that had been established to the Rocky Mountains. The boundary from the Rocky Mountains to the Pacific Ocean was agreed to by the Treaty of 1846.

1827.

COMMERCIAL CONVENTION.

Concluded August 6, 1827; ratification advised by the Senate January 9, 1828; ratified by the President January 12, 1828; ratifications exchanged April 2, 1828; proclaimed May 15, 1828. (Treaties and Conventions, 1889, p. 428.)

U. S. Treaties 1904, p. 316; 8 Stats. at Large, 361.

This convention indefinitely extended in force the Commercial Convention of July 3, 1815.

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ARTICLES.

I. Commercial convention continued. III. Ratification.
II. Duration.

1827.

CONVENTION RELATIVE TO THE NORTHEASTERN BOUNDARY.

Concluded September 29, 1827; ratification advised by the Senate January 14, 1828; ratified by the President February 12, 1828; ratifications exchanged April 2, 1828; proclaimed May 15, 1828. (Treaties and Conventions, 1889, p. 429.)

U. S. Treaties 1904, p. 318; 8 Stats. at Large, 362.

The determination of the northeastern boundary by the commission as provided for in Article V of the Treaty of Ghent not having been agreed to, it was referred by this convention of eight articles to the King of the Netherlands, who on January 10, 1831, submitted an award which was not accepted by the two governments. The boundary was finally determined by the convention of August 9, 1842.

1842.

CONVENTION AS TO BOUNDARIES, SUPPRESSION OF SLAVE TRADE, AND EXTRADITION.[1]

(WEBSTER-ASHBURTON TREATY.)

Concluded August 9, 1842; ratification advised by the Senate August 20, 1842; ratified by the President August 22, 1842; ratifications exchanged October 13, 1842; proclaimed November 10, 1842. (Treaties and Conventions, 1889, p. 432.)

U. S. Treaties 1904, p. 318; 8 Stats. at Large, 572.

[1] In re Kaine, 14 How. 103, 14 L. ed. 345; United States v. Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425; Bryant v. United States, 167 U. S. 104, 17 Sup. Ct. Rep. 744, 42 L. ed. 941; In re Kelley, 2 Low. 339, Fed. Cas. No. 7655; In re Dugan, 2 Low. 367, Fed. Cas. 4120; Ex parte Ross, 2 Bond, 252, Fed. Cas. No. 12,069; The British Prisoners (In re Sheazle), 1 Wood. & M. 66, Fed. Cas. 12,734; Ex parte Kaine, 3 Blatchf. 1, Fed Cas. No. 7597; Ex parte Van Aernam, 3 Blatchf. 160, Fed. Cas. No. 16,824; United States v. Caldwell, 8 Blatchf. 131, Fed. Cas. No. 14,707; In re MacDonnell, 11 Blatchf. 79, 170, Fed. Cas. No. 8771; United States v. Lawrence, 13 Blatchf. 295, Fed. Cas. No. 15,573; In re Fowler,

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ARTICLES.

I. Northwestern boundary agreed to.
II. Northern boundary, Lake Huron to Lake of the Woods.
III. Navigation of St. John River.
IV. Confirmation of prior land grants.
V. Distribution of "Disputed territory fund."
V. Commission to mark northeastern boundary line.
VII. Channels open to both parties.
VIII. Suppression of slave trade.
IX. Remonstrances with other powers.
X. Extradition of fugitives from justice.
XI. Duration.
XII. Ratification.

1846.

TREATY ESTABLISHING BOUNDARY WEST OF THE ROCKY MOUNTAINS.[1]

Concluded June 15, 1846; ratification advised by the Senate June 18, 1846; ratified by the President June 19, 1846; ratifications exchanged July 17, 1846; proclaimed August 5, 1846. (Treaties and Conventions, 1889, p. 438.)

U. S. Treaties 1904, p. 324; 9 Stats. at Large, Treaties, 24.

ARTICLES.

I. Boundary established; free navigation.
II. Navigation of Columbia River.
III. Property rights.
IV. Property of Puget's Sound Agricultural Company.
V. Ratification.

4 Fed. 303, 18 Blatchf. 430; Ex parte Lane, 6 Fed. 34; United States v. Watts, 8 Saw. 370, 14 Fed. 130; In re Wadge, 15 Fed. 864, 16 Fed. 332, 21 Blatchf. 300; In re Tully, 20 Fed. 812; In re Miller, 23 Fed. 32; In re Kelley, 25 Fed. 268; In re Kelly, 26 Fed. 852; Ex parte Hibbs, 26 Fed. 421; In re Ferrelle, 28 Fed. 878; In re McPhun, 30 Fed. 57; In re Fergus, 30 Fed. 607; In re Herres, 33 Fed. 165; In re Charleston, 34 Fed. 531; In re Reintz, 39 Fed. 204, 4 L. R. A. 236; In re Cross, 43 Fed. 517; In re Mineau, 45 Fed. 188; Hall v. Patterson, 45 Fed. 352; In re Carrier, 57 Fed. 578; In re Sternaman, 77 Fed. 595; Sternaman v. Peck, 80 Fed. 883, 26 C. C. A. 214, 83 Fed. 690, 28 C. C. A. 377; In re Newman, 79 Fed. 622; In re Bryant, 80 Fed. 282; In re Orpen, 86 Fed. 760; Wright v. Henkel, 190 U. S. 45, 23 Sup. Ct. Rep. 781, 47 L. ed. 948; Cohn v. Jones, 100 Fed. 639.

[1] See McKay v. Campbell, 2 Saw. 118, Fed. Cas. No. 8840; Town v. De Haven, 5 Saw. 146, Fed. Cas. No. 14,113.

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1850.

CONVENTION AS TO SHIP CANAL CONNECTING ATLANTIC AND PACIFIC OCEANS.

(CLAYTON-BULWER TREATY.)

Concluded April 19, 1850; ratification advised by the Senate May 22, 1850; ratified by the President May 23, 1850; ratifications exchanged July 4, 1850; proclaimed July 5, 1850. (Treaties and Conventions, 1889, p. 440.)

U. S. Treaties 1904. p. 327; 9 Stats. at Large, Treaties, 174.

This convention is superseded by the convention concluded November 18, 1901.

1850.

PROTOCOL OF A CONFERENCE HELD AT THE FOREIGN OFFICE, DECEMBER 9, 1850, CEDING HORSESHOE REEF TO THE UNITED STATES.

U. S. Treaties 1904, p. 327.

1853.

CLAIMS CONVENTION.[1]

Concluded February 8, 1853; ratification advised by the Senate March 15, 1853; ratified by the President March 17, 1853; ratifications exchanged July 26, 1853; proclaimed August 20, 1853. (Treaties and Conventions, 1869, p. 445.)

U. S. Treaties 1904, p. 328; 10 Stats. at Large, Treaties, 110.

The commission authorized by this convention of seven articles met at London, September 15, 1853, and adjourned January 15, 1855. The claims considered by the commission were all those arising since December 24, 1814, and remaining unsettled. The awards in favor of American claimants amounted to $329,734.16, and to British claimants $277,102.88.

[1] See One Hundred etc. Feet of Pine Lumber, 4 Blatchf. 182, Fed. Cas. No. 10,523.

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1854.

RECIPROCITY TREATY AS TO FISHERIES, DUTIES, AND NAVIGATION. BRITISH NORTH AMERICAN COLONIES.

Concluded June 5, 1854; ratification advised by the Senate August 2, 1854; ratified by the President August 9, 1854; ratifications exchanged September 9, 1854; proclaimed September 11, 1854. (Treaties and Conventions, 1889, p. 448.)

U. S. Treaties 1904, p. 328; 10 Stats. at Large, Treaties, 199.

This treaty, consisting of seven articles, granted mutual liberty of sea fisheries on the northeastern coast of the United States and the British North American provinces; it provided for the reciprocal free admission of certain articles, the produce of the British colonies or of the United States, and the right to navigate S. Lawrence River and the canals connecting the Great Lakes with the Atlantic and Lake Michigan. It was terminated by notice from the United States March 17, 1866. The commission authorized by Article I to designate the places reserved from the common right of fishing met in August, 1855, and ceased to exist by the termination of the treaty. Nearly all the work had been accomplished when the commission dissolved.

1854.

CLAIMS CONVENTION.

Concluded July 17, 1854; ratification advised by the Senate July 21, 1854; ratified by the President July 24, 1854; ratifications exchanged August 18, 1854; proclaimed September 11, 1854. (Treaties and Conventions, 1889, p. 453.)

U. S. Treaties 1904, p. 329; 10 Stats. at Large, Treaties, 213.

By this convention the existence of the claims commission under the convention of 1853 was extended four months.

1862.

TREATY FOR THE SUPPRESSION OF AFRICAN SLAVE TRADE.

Concluded April 7, 1862; ratification advised by the Senate April 24, 1862; ratified by the President April 25, 1862; ratifications exchanged May 20, 1862; proclaimed June 7, 1862. (Treaties and Conventions, 1889, p. 454.)

U. S. Treaties 1904, p. 329; 12 Stats. at Large, 1225.

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ARTICLES.

I. Search of suspected slavers by war vessels.
II. Authority and procedure.
III. Indemnity for losses.
IV. Mixed courts established.
V. Reparation for wrongful seizures.
VI. Evidences of slave trading.
VII. No compensation to vessels with slave equipments.
VIII. Disposal of vessels condemned.
IX. Punishment of owners, crew, etc.
X. Release of negroes.
XI. Instructions and regulations.
XII. Ratification; duration.

1863.

ADDITIONAL ARTICLES TO THE TREATY FOR THE SUPPRESSION OF SLAVE TRADE, 1862.

Concluded February 17, 1863; ratification advised by the Senate February 27, 1863; ratified by the President March 5, 1863; ratifications exchanged April 1, 1863; proclaimed April 22, 1863. (Treaties and Conventions, 1889, p. 466.)

U. S. Treaties 1904, p. 335; 13 Stats. at Large, 645.

This treaty extends the right of visit and detention to within thirty leagues of Madagascar, Porto Rico, and Santo Domingo.

1863.

CLAIMS TREATY.

Concluded July 1, 1863; ratification advised by the Senate January 18, 1864; ratified by the President March 2, 1864; ratifications exchanged March 3, 1864; proclaimed March 5, 1864. (Treaties and Conventions, 1889, p. 467.)

U. S. Treaties 1904, p. 336; 13 Stats. at Large, 651.

By this treaty the claims of the Hudson's Bay Company and the Puget's Sound Agricultural Company against the United States were referred to a commission. The commission met in Washington January 7, 1865, and on September 10, 1869, rendered their awards of $450,000 to the Hudson's Bay Company, and $200,000 to the Puget's Sound Agricultural Company.

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1870.

NATURALIZATION CONVENTION.

Concluded May 13, 1870; ratification advised by the Senate July 8, 1870; ratified by the President July 19, 1870; ratifications exchanged August 10, 1870; proclaimed September 16, 1870. (Treaties and Conventions, 1889, p. 470.)

U. S. Treaties 1904, p. 336; 16 Stats. at Large, 775.

ARTICLES.

I. Naturalization recognized.
II. Renunciation of previous naturalization.
III. Resumption of original citizenship.
IV. Ratification.

1870.

CONVENTION FOR THE SUPPRESSION OF SLAVE TRADE.

Concluded June 3, 1870; ratification advised by the Senate July 8, 1870; ratified by the President July 19, 1870; ratifications exchanged August 10, 1870; proclaimed September 16, 1870. (Treaties and Conventions, 1889, p. 472.)

U. S. Treaties 1904, p. 338; 16 Stats. at Large, 777.

ARTICLES.

I. Mixed courts abolished.
II. Jurisdiction over vessels seized.
III. Procedure.
IV. Instructions to war ships.
V. Former treaty continued.
VI. Notification of effect of convention.
VII. Duration; ratification.

1871.

CONVENTION AS TO RENUNCIATION OF NATURALIZATION.

Concluded February 23, 1871; ratification advised by the Senate March 22, 1871; ratified by the President March 24, 1871; ratifications exchanged May 4, 1871; proclaimed May 5, 1871. (Treaties and Conventions, 1889, p. 476.)

U. S. Treaties 1904, p. 342; 17 Stats. at Large, 841.

The Naturalization Convention of 1870 provided for the renunciation of citizenship acquired prior to that time in either country, and agreed that the manner of making such renunciation should be subsequently determined upon. This convention designated the time and method of making such renunciation of acquired citizenship.

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1871.

TREATY FOR THE SETTLEMENT OF ALL CAUSES OF DIFFERENCE.[1]

(TREATY OF WASHINGTON.)

Concluded May 8, 1871; ratification advised by the Senate May 24, 1871; ratified by the President May 25, 1871; ratifications exchanged June 17, 1871; proclaimed July 4, 1871. (Treaties and Conventions, 1889, p. 478.)

U. S. Treaties 1904, p. 343; 17 Stats. at Large, 863.

(Only the articles now in force are printed.)

ARTICLES.

I to XI, inclusive, relate to the Tribunal for arbitration of the Alabama Claims, and terminated by the rendering of the award at Geneva, September 14, 1872, of $15,500,000 to the United States.

XII to XVII, inclusive, provided for the reference of Civil War claims against both governments to a commission which met at Washington, September 26, 1871, and held its final meeting September 25, 1873, awarding $1,929,819 gold to Great Britain. The claims of United States citizens against Great Britain were all disallowed.

XVIII to XXV, relating to the Fisheries, were terminated July 1, 1885, upon notice given in pursuance of a joint resolution of March 3, 1883 (U. S. Stats., Vol. 22, p. 641). Articles XXII to XXV, inclusive, provided for the appointment of a commission to ascertain the amount of compensation to be awarded Great Britain for fishery privileges granted under Article XVIII. The commission met at Halifax, Nova Scotia, June 15, 1877, and November 23, 1877, awarded to Great Britain $5,500,000 in gold.

XXVI. Navigation of St. Lawrence, Yukon, Porcupine, and Stikine Rivers.

XXVII. Reciprocal use of canals.

XXVIII related to the navigation of Lake Michigan and expired by its own limitation.

XXIX related to bonding privileges and is not considered in effect. (See Messages and Papers of Presidents, Vol. 9, p. 335.)

XXX. Reciprocal transportation in vessels. This article was terminated July 1, 1885, upon notice given by the United States.

XXXI. Timber on river St. John.

XXXII and XXXIII relate to the fisheries and were terminated July 1, 1885.

XXXIV to XLII provide for the arbitration by the Emperor of Germany of the northwestern water boundary. (See p. 346.)

XLIII. Ratification.

[1] See Weld & Co. v. United States, 23 Ct. of Cl. 126.

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1873.

ADDITIONAL ARTICLE TO TREATY OF MAY 8, 1871, RESPECTING MEETING PLACE FOR THE COMMISSION UNDER ARTICLE XII.

Concluded January 18, 1873; ratification advised by the Senate February 14, 1873; ratified by the President February 28, 1873; ratifications exchanged April 10, 1873; proclaimed April 15, 1873. (Treaties and Conventions, 1889, p. 494.)

U. S. Treaties 1904, p. 348; 17 Stats. at Large, 947.

This article permitted the commission to hold its meetings at other places than Washington.

1877.

DECLARATION AFFORDING RECIPROCAL PROTECTION TO TRADEMARKS.

Concluded October 24, 1877; ratification advised by the Senate May 22, 1878; ratified by the President May 25, 1878; no exchange of ratifications made; proclaimed July 17, 1878. (Treaties and Conventions, 1889, p. 501.)

U. S. Treaties 1904, p. 349; 20 Stats. at Large, 703.

1889.

EXTRADITION CONVENTION.[1]

Concluded July 12, 1889; ratification advised by the Senate with amendments February 18, 1890; ratified by the President February 25, 1890; ratifications exchanged March 11, 1890; proclaimed March 25, 1890.

U. S. Treaties 1904, p. 349; 26 Stats. at Large, 1508.

ARTICLES.

I. Additional extraditable crimes.
II. Political crimes.
III. Prior offenses.
IV. Delivery of articles seized.
V. Crimes committed in other countries.
VI. Procedure.
VII. Escaped convicts.
VIII. No prior effect.
IX. Ratification; duration.

[1] See Bryant v. United States, 167 U. S. 104, 17 Sup. Ct. Rep. 744, 42 L. ed. 94; In re Breen, 75 Fed. 458; In re Bryant, 80 Fed. 282; Cosgrove v. Winney, 174 U. S. 641, 19 Sup. Ct. Rep. 598, 43 L. ed. 897; Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. Rep. 406, 45 L. ed. 577; Wright v. Henkel, 190 U. S. 45, 23 Sup. Ct. Rep. 781, 47 L. ed. 948; In re Taylor, 118 Fed. 196; In re Wright, 123 Fed. 463; In re Frank, 107 Fed. 272.

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1892.

CONVENTION RELATING TO FUR SEALS IN BERING SEA.

Concluded February 29, 1892; ratification advised by Senate March 29, 1892; ratified by President April 22, 1892; ratifications exchanged May 7, 1892; proclaimed May 9, 1902.

U. S. Treaties 1904, p. 352; 27 Stats. at Large, 947.

ARTICLES.

I. Tribunal.
II. Meeting; agent.
III. Submission of case.
IV. Procedure.
V. Arguments.
VI. Points for decision.
VII. Regulations to preserve seals.
VIII. Liabilities for injuries.
IX. Report.
X. Expenses.
XI. Decision.
XII. Arbitration expenses.
XIII. Record.
XIV. Final settlement.
XV. Ratification.

1892.

CONVENTION FOR THE RENEWAL OF THE EXISTING MODUS VIVENDI IN BERING SEA.

Concluded April 18, 1892; ratification advised by the Senate April 19, 1892; ratified by the President April 22, 1892; ratifications exchanged May 7, 1892; proclaimed May 9, 1892.

U. S. Treaties 1904, p. 366; 27 Stats. at Large, 952.

By this convention of seven articles both governments prohibited the killing of fur seals by their respective citizens and subjects in the eastern part of Bering Sea during the pendency of the fur-seal arbitration.

1892.

TREATY FOR THE RECOVERY OF DESERTERS FROM MERCHANT VESSELS.

Concluded June 3, 1892; ratification advised by the Senate June 30, 1892; ratified by the President July 14, 1892; ratifications exchanged August 1, 1892; proclaimed August 1, 1892.

U. S. Treaties 1904, p. 366; 27 Stats. at Large, 961.

ARTICLES.

I. Arrests of deserting seamen.
II. Ratifications.
III. Duration.

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1892.

CONVENTION FOR DELIMITING BOUNDARIES NOT PERMANENTLY MARKED.

Concluded July 22, 1892; ratification advised by the Senate July 25, 1892; ratified by the President July 29, 1892; ratifications exchanged August 23, 1892; proclaimed August 26, 1892.

U. S. Treaties 1904, p. 368; 27 Stats. at Large, 955.

ARTICLES.

I. Commissions to survey Alaskan boundary.
II. Commission to mark the boundary in Passamaquoddy Bay.
III. Ratification.

1894.

CONVENTION EXTENDING THE TERMS OF THE ALASKAN BOUNDARY COMMISSIONS.

Concluded February 3, 1894; ratification advised by the Senate February 12, 1894; ratified by the President February 15, 1894; ratifications exchanged March 28, 1894; proclaimed March 28, 1894.

U. S. Treaties 1904, p. 370; 28 Stats. at Large, 1200.

ARTICLES.

I. Term of commissions extended.
II. Ratification.

1896.

CLAIMS CONVENTION.

Concluded February 8, 1896; ratification advised by the Senate with amendments April 15, 1896; ratified by the President April 23, 1896; ratifications exchanged June 3, 1896; proclaimed June 11, 1896.

U. S. Treaties 1904, p. 371; 29 Stats. at Large, 844.

This convention provided for a commission to settle the claims presented by Great Britain for the losses sustained by the seizures of

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British vessels for fur sealing in the Bering Sea, under the provisions of the award of the Paris Tribunal of 1893. The two commissioners authorized by the convention held their first session at Victoria, British Columbia, November 25, 1896, and December 17, 1897, rendered an award of $473,151.26 against the United States.

1898.

PROTOCOL OF THE CONFERENCES AT WASHINGTON IN MAY, 1898, PRELIMINARY TO THE APPOINTMENT OF A JOINT COMMISSION FOR THE ADJUSTMENT OF QUESTIONS AT ISSUE BETWEEN THE UNITED STATES AND GREAT BRITAIN, IN RESPECT TO THE RELATIONS OF THE FORMER WITH THE DOMINION OF CANADA.

1899.

CONVENTION AS TO TENURE AND DISPOSITION OF REAL AND PERSONAL PROPERTY.

Concluded March 2, 1899; ratification advised by the Senate March 22, 1900; ratified by the President July 16, 1900; ratifications exchanged July 28, 1900; proclaimed August 6, 1900.

U. S. Treaties 1904, p. 375; 31 Stats. at Large, 1939.

ARTICLES.

I. Disposition of real property.
II. Disposition of personal property.
III. Decease of property holder.
IV. Not applicable to colonies or possessions.
V. Most favored nation treatment.
VI. Duration.
VII. Ratification.
Accession of Colonies of Great Britain to convention.

1899.

MODUS VIVENDI WITH GREAT BRITAIN, FIXING A PROVISIONAL BOUNDARY LINE BETWEEN THE TERRITORY OF ALASKA AND THE DOMINION OF CANADA ABOUT THE HEAD OF LYNN CANAL.

Concluded October 20, 1899.

U. S. Treaties 1904, p. 378.

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1900.

SUPPLEMENTARY EXTRADITION TREATY.

Concluded December 13, 1900; ratification advised by Senate March 8, 1901; ratified by President March 28, 1901; ratifications exchanged April 22, 1901; proclaimed April 22, 1901.

U. S. Treaties 1904, p. 379; 32 Stats. at Large, 1864.

ARTICLES.

I. Extraditable crimes.
II. Extradition convention of July 12, 1899; ratification; duration.

1901.

TREATY TO FACILITATE THE CONSTRUCTION OF A SHIP CANAL.

Concluded November 18, 1901; ratification advised by Senate December 16, 1901; ratified by President December 26, 1901; ratifications exchanged February 21, 1902; proclaimed February 22, 1902.

U. S. Treaties 1904, p. 380; 32 Stats. at Large, 1903.

ARTICLES.

I. Convention of April 19, 1850.
II. Construction of canal.
III. Rules of neutralization.
IV. Change of sovereignty.
V. Ratification.

1902.

SUPPLEMENTARY CONVENTION AS TO TENURE AND DISPOSITION OF REAL AND PERSONAL PROPERTY.

Concluded January 13, 1902; ratification advised by Senate February 17, 1902; ratified by the President March 7, 1902; ratifications exchanged April 2, 1902; proclaimed April 2, 1902.

U. S. Treaties 1904, p. 377; 32 Stats. at Large. 1914.

1902.

TREATY AS TO IMPORT DUTIES IN ZANZIBAR.

Concluded May 31, 1902; ratification advised by Senate June 30, 1902; ratified by President July 22, 1902; ratifications exchanged October 17, 1902; proclaimed October 17, 1902.

U. S. Treaties 1904, p. 382; 32 Stats. at Large, 1959.

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ARTICLES.

I. Import duties.
II. Most favored nation treatment as to duties.
III. Most favored nation treatment as to commercial interests.

1903.

TREATY AS TO LIGHT AND HARBOR DUES IN ZANZIBAR.

Concluded June 5, 1903; ratification advised by Senate November 25, 1903; ratified by President December 8, 1903; ratifications exchanged December 24, 1903; proclaimed December 24, 1903.

U. S. Treaties 1904, p. 384; 33 Stats. at Large, pt. 2, p. 2172.

ARTICLES.

I. Collection of light and harbor dues.
II. Lighthouses; consent of powers.
III. Ratification.

1903.

CONVENTION AS TO ALASKAN BOUNDARY.

Concluded January 24, 1903; ratification advised by Senate February 11, 1903; ratified by President February 24, 1903; ratifications exchanged March 3, 1903; proclaimed March 3, 1903.

U. S. Treaties 1904, p. 384; 32 Stats. at Large, 1961.

ARTICLES.

I. Tribunal.
II. Procedure.
III. Treaties considered.
IV. Questions to be decided.
V. Meeting.
VI. Decision.
VII. Ratification.

DECISION OF THE ALASKAN BOUNDARY TRIBUNAL UNDER THE TREATY OF JANUARY 24, 1903, BETWEEN THE UNITED STATES AND GREAT BRITAIN.

U. S. Treaties 1904, p. 390.

Seven questions were submitted to the tribunal and the decision was dated October 20, 1903. The tribunal consisted of six jurists.

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1905.

TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN BY WHICH THE UNITED STATES RELINQUISHES EXTRATERRITORIAL RIGHTS IN ZANZIBAR.

Signed at Washington, February 25, 1905; ratification advised by the Senate March 8, 1905; ratified by the President, May 12, 1905; ratified by Great Britain, April 3, 1905; ratifications exchanged at Washington June 12, 1905; proclaimed June 12, 1905.

Treaties and Proclamations, 2870; 34 Stats. at Large, pt. 3.

ARTICLES.

I. Extraterritorial rights relinquished in British Protectorate of Zanzibar—Jurisdiction of consular courts renounced.
II. Authority to British courts.
III. Ratification.

1905.

SUPPLEMENTARY CONVENTION BETWEEN THE UNITED STATES AND GREAT BRITAIN FOR THE EXTRADITION OF CRIMINALS.

Signed at London, April 12, 1905; ratification advised by the Senate December 13, 1905; ratified by the President December 21, 1906; ratified by Great Britain November 14, 1906; ratifications exchanged at Washington December 21, 1906; proclaimed February 12, 1907.

Treaties and Proclamations, 2903; 34 Stats. at Large, pt. 3.

ARTICLES.

I. Crimes added.
II. Former treaty applicable.

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1906.

CONVENTION BETWEEN THE UNITED STATES AND GREAT BRITAIN PROVIDING FOR THE SURVEYING AND MARKING OUT UPON THE GROUND OF THE 141ST DEGREE OF WEST LONGITUDE WHERE SAID MERIDIAN FORMS THE BOUNDARY LINE BETWEEN ALASKA AND THE BRITISH POSSESSIONS IN NORTH AMERICA.

Signed at Washington April 21, 1906; ratification advised by the Senate April 25, 1906; ratified by the President July 10, 1906; ratified by Great Britain June 9, 1906; ratifications exchanged at Washington August 16, 1906; proclaimed August 21, 1906.

Treaties and Proclamations, 2948; 34 Stats. at Large, pt. 3.

ARTICLES.

I. Commissioners, etc.
II. Boundary line monuments.
III. Expenses.
IV. Reports.
V. Ratification.

GREECE.

1837.

TREATY OF COMMERCE AND NAVIGATION.

Concluded December 22, 1837; ratification advised by the Senate March 26, 1838; ratified by the President April 12, 1838: ratifications exchanged June 13, 1838; proclaimed August 30, 1838. (Treaties and Conventions, 1889, p. 502.)

U. S. Treaties 1904, p. 394; 8 Stats. at Large, 498.

ARTICLES.

I. Freedom of commerce.
II. Tonnage duties, etc.
III. Imports.
IV. Exports.
V. Coasting trade.
VI. Government purchases.
VII. Navigation duties.
VIII. No discriminating prohibitions.
IX. Transit, bounties, and drawbacks.
X. Vessels entering without unloading.
XI. Unloading part of cargo.
XII., XIII., XIV. These articles abrogated by treaty concluded Nov. 19, 1902.
XV. Quarantine.
XVI. Blockades.
XVII. Duration.
XVIII. Ratification.

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1902.

CONSULAR CONVENTION.

Concluded November 19, 1902 (December 2, 1902); ratification advised by Senate February 16, 1903; ratified by President May 20, 1903; ratifications exchanged July 9, 1903; proclaimed July 11, 1903.

U. S. Treaties 1904, p. 399; 33 Stats. at Large, pt. 2, p. 2122.

ARTICLES.

I. Consular officers.
II. Most favored nation consular privileges, etc.
III. Exemptions.
IV. Testimony by consuls.
V. Arms and flag.
VI. Immunities of offices and archives.
VII. Acting officers.
VIII. Vice-consuls and agents.
IX. Application to authorities.
X. Notarial powers.
XI. Estates of deceased persons.
XII. Shipping disputes.
XIII. Deserters from ships.
XIV. Damages to vessels at sea.
XV. Shipwrecks and salvage.
XVI. Examination on vessels.
XVII. Ratification; duration.

GUATEMALA.

1849.

TREATY OF PEACE, FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded March 3, 1849; ratification advised by the Senate September 24, 1850; time for exchange of ratifications extended by the Senate September 27, 1850, and again June 7, 1852; ratified by the President November 14, 1850; ratifications exchanged May 13, 1852; proclaimed July 28, 1852. (Treaties and Conventions, 1889, p. 508.)

U. S. Treaties 1904, p. 405; 10 Stats. at Large, Treaties, 1.

This treaty of thirty-three articles was terminated by notice November 4, 1874.

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1901.

TRADEMARK CONVENTION.

Concluded April 15, 1901; ratification advised by Senate January 27, 1902; ratified by President February 1, 1902; ratifications exchanged April 3, 1902; proclaimed April 11, 1902.

U. S. Treaties 1904, p. 405; 32 Stats. at Large, 1866.

ARTICLES.

I. Reciprocal rights.
II. Formalities.
III. Duration.
VI. Ratification.

1901.

CONVENTION RELATING TO TENURE AND DISPOSITION OF REAL AND PERSONAL PROPERTY.

Concluded August 27, 1901; ratification advised by Senate January 30, 1902; ratified by President February 6, 1902; ratifications exchanged September 16, 1902; proclaimed September 18, 1902.

U. S. Treaties 1904, p. 406; 32 Stats. at Large, 1944.

ARTICLES.

I. Disposition of real property.
II. Disposition of personal property.
III. Notice of decease of citizens, etc.
IV. Duration.
V. Ratification.

1903.

EXTRADITION TREATY.

Concluded February 27, 1903; ratification advised by Senate March 11, 1903; ratified by President July 8, 1903; ratifications exchanged July 16, 1903; proclaimed July 17, 1903.

U. S. Treaties 1904, p. 408; 33 Stats. at Large, pt. 2, 2147.

ARTICLES.

I. Delivery of accused.
II. Extraditable offenses.
III. Offense for which tried.
IV. Political offenses.
V. Nondelivery of citizens.
VI. Deferring extradition.
VII. Persons claimed by other countries.
VIII. Limitations.
IX. Provisional arrest.
X. Procedure.
XI. Expenses.
XII. Property in possession of accused.
XIII. Crimes by citizens of one against other contracting power.
XIV. Duration; ratification.

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HAYTI.

1864.

TREATY OF AMITY, COMMERCE AND NAVIGATION, AND EXTRADITION.

Concluded November 3, 1864; ratification advised by the Senate January 17, 1865; ratified by the President May 18, 1865; ratifications exchanged May 22, 1865; proclaimed July 6, 1865. (Treaties and Conventions, 1889, p. 551.)

U. S. Treaties 1904, p. 414; 13 Stats. at Large, 711.

ARTICLES.

I. Amity.
II. Most favored nation treatment.
III. Immunity in case of war.
IV. Confiscations prohibited.
V. Personal exemptions of citizens.
VI. Trade privileges.
VII. Privacy of books and papers.
VIII. Religious freedom.
IX. Disposal of personal property.
X. Imports.
XI. Exports.
XII. Coasting trade.
XIII. Equality of duties and prohibitions.
XIV. Discriminating duties.
XV. Rights of asylum.
XVI. Shipwrecks.
XVII. Neutrality of vessels.
XVIII. Blockades.
XIX. Free ships, free goods.
XX. Contraband articles.
XXI. Goods not contraband.
XXII. Merchant ships.
XXIII. Papers of neutral vessels.
XXIV. Right of search.
XXV. Ships under convoy.
XXVI. Captures.
XXVII. Care of property captured.
XXVIII. Prize courts.
XXIX. Entry of captured vessels.
XXX. Restriction on foreign privateers.
XXXI. Letters of marque forbidden.
XXXII. Diplomatic privileges.
XXXIII. Consular service.
XXXIV. Exequaturs.
XXXV. Consular privileges.
XXXVI. Deserters from ships.
XXXVII. Consular convention to be concluded.
XXXVIII. Extradition of fugitives from justice.
XXXIX. Extraditable crimes.
XL. Surrender; expenses.
XLI. Political offenses.
XLII. Duration.
XLIII. Ratification.

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1902.

NATURALIZATION TREATY.

Concluded March 22, 1902; ratification advised by Senate February 1, 1904; ratified by President March 17, 1904; ratifications exchanged March 19, 1904; proclaimed March 24, 1904.

U. S. Treaties 1904, p. 425; 33 Stats. at Large, pt. 2, p. 2101.

ARTICLES.

I. Reciprocal recognition of citizens.
II. Renunciation of nationality.
III. Intent to return.
IV. Punishment of citizens.
V. Declaration of intention.
VI. Duration.
VII. Ratification.

1903.

NATURALIZATION TREATY (EXTENSION).

Concluded February 28, 1903; ratification advised by Senate February 1, 1904; ratified by President March 17, 1904; ratifications exchanged March 19, 1904; proclaimed March 24, 1904.

U. S. Treaties 1904, p. 427; 33 Stats. at Large, pt. 2, p. 2157.

This treaty extends the period for the exchange of ratifications of the naturalization treaty of February 28, 1903, for twelve months from March 22, 1903.

1904.

TREATY BETWEEN THE UNITED STATES AND THE REPUBLIC OF HAYTI FOR THE MUTUAL EXTRADITION OF CRIMINALS.

Signed at Washington, August 9, 1904; ratification advised by the Senate, December 15, 1904; ratified by the President June 17, 1905; ratified by Hayti August 25, 1904; ratifications exchanged at Washington June 28, 1905; proclaimed June 28, 1905.

Treaties and Proclamations, 2858; 34 Stats. at Large, pt. 3.

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ARTICLES.

I. Reciprocal delivery of persons charged with crimes.
II. Extraditable crimes.
III. Attempts to commit crimes.
IV. Neither party bound to deliver up its own citizens.
V. Persons under prosecution in country where found.
VI. Persons claimed by other countries.
VII. No surrender for political offenses.
VIII. Trial to be only for offense for which extradited.
IX. Application for provisional arrest.
X. Requisitions.
XI. Evidence required.
XII. Disposal of articles seized with person.
XIII. Expenses.
XIV. Applicable to United States insular possessions.
XV. Effect.
XVI. Exchange of ratifications.

HANOVER.

Hanover was conquered and merged into Prussia in 1866, and is now included in the German Empire.

1840.

TREATY OF COMMERCE AND NAVIGATION.

Concluded May 20, 1840; ratification advised by the Senate July 15, 1840; ratified by the President July 28, 1840; ratifications exchanged November 14, 1840; proclaimed January 2, 1841. (Treaties and Conventions, 1889, p. 528.)

U. S. Treaties 1904, p. 428; 8 Stats. at Large, 552.

This treaty, consisting of ten articles, was superseded by the treaty of 1846.

1846.

TREATY OF COMMERCE AND NAVIGATION.

Concluded June 10, 1846; ratification advised by the Senate January 6, 1847; ratified by the President July 28, 1847; ratifications exchanged March 15, 1847; proclaimed April 24, 1847. (Treaties and Conventions, 1889, p. 523.)

U. S. Treaties 1904, p. 428; 9 Stats. at Large, Treaties, 55.

This treaty of thirteen articles terminated on the merging of the country into the Kingdom of Prussia.

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1855.

EXTRADITION TREATY.

Concluded January 18, 1855; ratification advised by the Senate March 13, 1855; ratified by the President March 18, 1855; ratifications exchanged April 17, 1855; proclaimed May 5, 1855. (Treaties and Conventions, 1889, p. 528.)

U. S. Treaties 1904, p. 428.

This treaty of six articles terminated in 1866, when Hanover was merged into the Kingdom of Prussia.

1861.

CONVENTION ABOLISHING STADE OR BRUNSHAUSEN DUES.

Concluded November 6, 1861; ratification advised by the Senate February 3, 1862; ratified by the President February 7, 1862; ratifications exchanged April 29, 1862; proclaimed June 17, 1862. (Treaties and Conventions, 1889, p. 530.)

U. S. Treaties 1904, p. 428; 12 Stats. at Large, 1187.

This treaty, consisting of seven articles, terminated on the incorporation of the Kingdom into Prussia.

HANSEATIC REPUBLICS.

(BREMEN, HAMBURG, AND LUBECK.)

The Hanseatic Republics were incorporated into the North German Union July 1, 1867.

1827.

CONVENTION OF FRIENDSHIP, COMMERCE, AND NAVIGATION.

Concluded December 20, 1827; ratification advised by the Senate January 7, 1828; ratified by the President; ratifications exchanged June 2, 1828; proclaimed June 2, 1828. (Treaties and Conventions, 1889, p. 533.)

U. S. Treaties 1904, p. 429; 8 Stats. at Large, 366.

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ARTICLES.

I. Equality of duties.
II. Import and export duties.
III. Government purchases.
IV. Proof of Hanseatic vessels.
V. Rights to trade.
VI. Commercial privileges.
VII. Property rights.
VIII. Special protection to persons and property.
IX. Most favored nation privileges.
X. Duration.
XI. Ratification.

1828.

ADDITIONAL ARTICLE TO CONVENTION OF 1827.

Concluded June 4, 1828; ratification advised by the Senate December 29, 1828; ratified by the President; ratifications exchanged January 14, 1829; proclaimed July 29, 1829. (Treaties and Conventions, 1889, p. 537.)

U. S. Treaties 1904, p. 433; 8 Stats. at Large, 386.

This article, relating to the arrest of deserters at the request of consuls, was superseded by the consular convention with the German Empire, 1871.

1852.

CONSULAR CONVENTION.

Concluded April 30, 1852; ratification advised by the Senate August 30, 1852; ratified by the President September 24, 1852: ratifications exchanged February 25, 1853; proclaimed June 6, 1853. (Treaties and Conventions, 1889, p. 538.)

U. S. Treaties 1904, p. 433; 10 Stats. at Large, Treaties, 95.

This convention of three articles was superseded by the general consular convention of the German Empire, 1871.

HAWAIIAN ISLANDS.

The cession of the Hawaiian Islands to the United States having been accepted by the resolution approved by the President July 7, 1898 (30 Stats. at Large, 75), the treaties with that country terminated upon the formation of the government for the islands.

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1849.

TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION AND EXTRADITION.

Concluded December 20, 1849; ratification advised by the Senate January 14, 1850; ratified by the President February 4, 1850; ratifications exchanged August 24, 1850; proclaimed November 9, 1850. (Treaties and Conventions, 1889, p. 540.)

U. S. Treaties 1904, 434; 9 Stats. at Large, Treaties, 178.

1875.

TREATY OF RECIPROCITY.[1]

Concluded January 30, 1875; ratification advised by the Senate March 18, 1875; ratified by the President May 31, 1875; ratifications exchanged June 3, 1875; proclaimed June 3, 1875. (Treaties and Conventions, 1889, p. 546.)

U. S. Treaties 1904, 434; 19 Stats. at Large, Treaties, 69.

By this treaty of six articles certain specified articles were admitted free of duty into the United States and the Hawaiian Islands respectively.

1884.

TREATY OF RECIPROCITY.[1]

Concluded December 6, 1884; ratification advised by the Senate with amendments January 20, 1887; ratified by the President November 7, 1887; ratifications exchanged November 9, 1887; proclaimed November 9, 1887. (Treaties and Conventions, 1889, p. 1187.)

U. S. Treaties 434; 25 Stats. at Large, 1399.

By this treaty the Reciprocity Treaty of 1875 was extended for a further term of seven years, and there was granted to the United States the exclusive right to establish a coaling station at Pearl River Harbor.

[1] See Nethercleft v. Robertson, 23 Blatchf. 548, 27 Fed. 737.

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HESSE.

(See NORTH GERMAN CONFEDERATION.)

1844.

CONVENTION ABOLISHING DROIT D'AUBAINE AND TAXES ON EMIGRATION.

Concluded March 26, 1844; ratification advised by the Senate June 12, 1844; ratified by the President June 22, 1844; ratifications exchanged October 16, 1844; time for exchange of ratifications extended to July 4, 1845, and exchange previous thereto declared regular by the Senate January 13, 1845; proclaimed May 8, 1845. (Treaties and Conventions, 1889, p. 562.)

U. S. Treaties 1904, p. 435; 9 Stats. at Large, Treaties, 1.

ARTICLES.

I. Droit d'aubaine, etc., abolished.
II. Disposition of real estate.
III. Disposition of personal property.
IV. Rights of absent heirs.
V. Inheritance disputes.
VI. Ratification.

1868.

NATURALIZATION CONVENTION.

Concluded August 1, 1868; ratification advised by the Senate April 12, 1869; ratified by the President April 18, 1869; ratifications exchanged July 23, 1869; proclaimed August 31, 1869. (Treaties and Conventions, 1889, p. 563.)

U. S. Treaties 1904, p. 437; 16 Stats. at Large, 743.

ARTICLES.

I. Naturalization recognized.
II. Prior offenses.
III. Extradition.
IV. Renunciation of acquired citizenship.
V. Duration.
VI. Ratification.

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HONDURAS.

1864.

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION.

Concluded July 4, 1864; ratification advised by the Senate February 20, 1865; ratified by the President March 9, 1865; ratifications exchanged May 5, 1865; proclaimed May 30, 1865. (Treaties and Conventions, 1889, p. 566.)

U. S. Treaties 1904, p. 439; 13 Stats. at Large, 699.

ARTICLES.

I. Amity.
II. Freedom of commerce; coasting trade.
III. Most favored nation privileges.
IV. Equality of import and export duties.
V. Shipping dues.
VI. Reciprocal treatment of vessels.
VII. Protection of property, etc.
VIII. Disposal of property, etc.
IX. Exemptions from military service, loans, etc.
X. Diplomatic and consular privileges.
XI. Protection in case of war.
XII. General liberties.
XIII. Duration of Articles IV, V, and VI.
XIV. Neutrality of Honduras Interoceanic Railway.
XV. Ratification.

ITALY.

1868.

CONSULAR CONVENTION.

Concluded February 8, 1868; ratification advised by the Senate June 17, 1868; ratified by the President June 22, 1868; ratifications exchanged September 17, 1868; proclaimed February 23, 1869. (Treaties and Conventions, 1889, p. 573.)

U. S. Treaties 1904, p. 446; 15 Stats. at Large, 605.

This convention, consisting of seventeen articles, was superseded by the convention of 1878 upon the exchange of ratifications September 17, 1878.

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1868.

EXTRADITION CONVENTION.[1]

Concluded March 23, 1868; ratification advised with an amendment by the Senate June 17, 1868; ratified by the President June 22, 1868; ratifications exchanged September 17, 1868; proclaimed September 30, 1868. (Treaties and Conventions, 1889, p. 578.)

U. S. Treaties 1904, p. 446; 15 Stats. at Large, 629.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Political offenses.
IV. Persons under arrest.
V. Procedure.
VI. Expenses.
VII. Duration; ratification.

1869.

CONSULAR CONVENTION.

Concluded January 21, 1869; ratification advised by the Senate February 16, 1869; ratified by the President February 24, 1869; ratifications exchanged May 7, 1869; proclaimed May 11, 1869. (Treaties and Conventions, 1889, p. 577.)

U. S. Treaties 1904, p. 448; 16 Stats. at Large, 769.

This was an article extending the time for the exchange of the ratifications of the Consular Convention of 1868.

1869.

CONVENTION ADDITIONAL TO EXTRADITION CONVENTION, 1868.

Concluded January 21, 1869; ratification advised by the Senate February 16, 1869; ratified by the President February 23, 1869; ratifications exchanged May 7, 1869; proclaimed May 11, 1869. (Treaties and Conventions, 1889, p. 580.)

U. S. Treaties 1904, p. 449; 16 Stats. at Large, 767.

[1] See In re De Giacoma, 12 Blatchf. 391, Fed. Cas. No. 3747.

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ADDITIONAL ARTICLE RELATING TO THE CRIME OF EMBEZZLEMENT.[1]

It is agreed that the concluding paragraph of the second Article of the Convention aforesaid shall be so amended as to read as follows:

8. Embezzlement by any person or persons hired or salaried, to the detriment of their employers when these crimes are subject to infamous punishment according to the laws of the United States, and criminal punishment according to the laws of Italy.

In witness whereof the respective Plenipotentiaries have signed the present Article in duplicate and have affixed thereto the seal of their arms.

Done at Washington the 21st day of January, 1869.

WILLIAM H. SEWARD. [SEAL]
M. CERRUTI. [SEAL]

1871.

TREATY OF COMMERCE AND NAVIGATION.

Concluded February 26, 1871; ratification advised by the Senate April 15, 1871; ratified by the President April 29, 1871; ratifications exchanged November 18, 1871; proclaimed November 23, 1871. (Treaties and Conventions, 1889, p. 581.)

U. S. Treaties 1904, p. 449.

ARTICLES.

I. Freedom of commerce and navigation.
II. Liberty to trade and travel.
III. Rights of person and property; exemptions.
IV. Embargo.
V. No shipping discriminations.
VI. No discriminations of imports and exports.
VII. Shipping privileges.
VIII. Exemptions from shipping dues, etc.
IX. Shipwrecks.
X. Completing crews.
XI. Piratical captures.
XII. Exemptions in war.
XIII. Blockade.
XIV. Regulation of blockade.
XV. Contraband articles.
XVI. Rights of neutrals; free ships, free goods.
XVII. Proof of nationality of vessels.
XVIII. Right of search.
XIX. Vessels under convoy.
XX. Conduct of commanders of war vessels.
XXI. Protection in case of war.
XXII. Disposal of property.
XXIII. Legal rights.
XXIV. Most favored nation privileges.
XXV. Duration.
XXVI. Ratification.

[1] See Cantini v. Tillman, 54 Fed. 969; Storti v. Massachusetts, 183 U. S. 138, 22 Sup. Ct. Rep. 72, 46 L. ed. 120.

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1878.[1]

CONSULAR CONVENTION.

Concluded May 8, 1878; ratification advised by the Senate May 28, 1878; ratified by the President June 4, 1878; ratifications exchanged September 18, 1878; proclaimed September 27, 1878. (Treaties and Conventions, 1889, p. 538.)

U. S. Treaties 1904, p. 457; 20 Stats. at Large, 725.

ARTICLES.

I. Consular recognition.
II. Exequaturs.
III. Exemptions.
IV. Status in legal proceedings.
V. Arms and flags.
VI. Archives.
VII. Vacancies.
VIII. Vice-consuls and agents.
IX. Dealings with officials.
X. General powers.
XI. Shipping disputes.
XII. Disputes between passengers and officers of vessels.
XIII. Deserters from ships.
XIV. Damages at sea.
XV. Shipwrecks.
XVI. Death of citizens.
XVII. Most favored nation privileges.
XVIII. Duration; ratification.

1881.

CONVENTION SUPPLEMENTAL TO CONSULAR CONVENTION, 1878.

Concluded February 24, 1881; ratification advised by the Senate May 5, 1881; ratified by the President May 10, 1881; ratifications exchanged June 18, 1881; proclaimed June 29, 1881. (Treaties and Conventions, 1889, p. 593.)

U. S. Treaties 1904, p. 462; 22 Stats. at Large, 831.

ARTICLES.

I. Shipping disputes; substitute for article XI.
II. Ratification and effect.

1882.

TRADEMARK DECLARATION.

Signed June 1, 1882; ratification advised by the Senate February 25, 1884; proclaimed March 19, 1884. (Treaties and Conventions, 1889, p. 595.)

U. S. Treaties 1904, p. 463.

[1] See The Salomoni, 29 Fed. 534.

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1884.

CONVENTION ADDITIONAL TO EXTRADITION CONVENTION, 1868.

Concluded June 11, 1884; ratification advised by the Senate July 5, 1884; ratified by the President April 10, 1885; ratifications exchanged April 24, 1885; proclaimed April 24, 1885. (Treaties and Conventions, 1889, p. 595.)

U. S. Treaties 1904, p. 464; 24 Stats. at Large, 1001.

ARTICLES.

I. Kidnaping added to extraditable crimes.
II. Preliminary detention.
III. Effect; ratification.

1900.

RECIPROCAL COMMERCIAL ARRANGEMENT WITH ITALY.

Concluded February 8, 1900; proclaimed July 18, 1900.

U. S. Treaties 1904, p. 465; 31 Stats. at Large, 1979.

ARTICLES.

I. Concessions by the United States.
II. Concessions by Italy.
III. Approval; duration.

JAPAN.

1854.

TREATY OF PEACE, AMITY, AND COMMERCE.

Concluded March 31, 1854; ratification advised by the Senate July 15, 1854; ratified by the President August 7, 1854; ratifications exchanged February 21, 1855; proclaimed June 22, 1855. (Treaties and Conventions, 1889, p. 597.)

U. S. Treaties 1904, p. 468; 11 Stats. at Large, 597.

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ARTICLES.

I. Peace and amity.
II. Opening of Simoda and Hakodade.
III. Shipwrecks.
IV. Treatment of shipwrecked persons.
V. Shipwrecked persons at Simoda and Hakodade.
VI. Business.
VII. Trade.
VIII. Supplies to vessels.
IX. Most favored nation privileges.
X. Open ports.
XI. Consuls.
XII. Ratification.

This treaty of twelve articles was superseded from July 17, 1899, by treaty of November 22, 1894, Article XVIII.

1857.[1]

COMMERCIAL AND CONSULAR TREATY.

Concluded June 17, 1857; ratification advised by the Senate June 15, 1858; ratified by the President June 30, 1858; proclaimed June 30, 1858. (Treaties and Conventions, 1889, p. 599.)

U. S. Treaties 1904, p. 468; 11 Stats. at Large, 723.

This treaty of nine articles was superseded by the treaty of 1858.

1858.

TREATY OF COMMERCE AND NAVIGATION.

Concluded July 29, 1858; ratification advised by the Senate December 15, 1858; ratified by the President April 12, 1860; ratifications exchanged May 22, 1860; proclaimed May 23, 1860. (Treaties and Conventions, 1889, p. 601.)

U. S. Treaties 1904, p. 468; 12 Stats. at Large, 1051.

This treaty containing fourteen articles was superseded on July 17, 1899, by treaty of November 22, 1894, Article XVIII.

[1] See Ross v. McIntyre, 140 U. S. 453, 11 Sup. Ct. Rep. 897, 35 L. ed. 581.

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1864.

CONVENTION FOR THE REDUCTION OF IMPORT DUTIES.

Concluded January 28, 1864; ratification advised by the Senate February 21, 1866; ratified by the President April 9, 1866; proclaimed April 9, 1866. (Treaties and Conventions, 1889, p. 610.)

U. S. Treaties 1904, p. 469; 14 Stats. at Large, 655.

This convention of four articles was superseded by the convention of 1866, below.

1864.

CONVENTION FOR THE PAYMENT OF THE SIMONOSEKI INDEMNITIES.

Concluded October 22, 1864; ratification advised by the Senate February 21, 1866; ratified by the President April 9, 1866; proclaimed April 9, 1866. (Treaties and Conventions, 1889, p. 611.)

U. S. Treaties 1904, p. 469; 14 Stats. at Large, 665.

This convention, between Japan and the United States, Great Britain, France, and the Netherlands, provided for the payment of $3,000,000 to the four powers.

1866.

CONVENTION ESTABLISHING TARIFF OF DUTIES BETWEEN JAPAN AND THE UNITED STATES, GREAT BRITAIN, FRANCE, AND THE NETHERLANDS.

Concluded June 25, 1866; ratification advised by the Senate June 17, 1868. (Treaties and Conventions, 1889, p. 612.)

U. S. Treaties 1904, p. 469.

This treaty containing twelve articles was not proclaimed and was superseded July 17, 1899, by the treaty of November 22, 1894.

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1878.

COMMERCIAL CONVENTION.

Concluded July 25, 1878; ratification advised by the Senate December 18, 1878; ratified by the President January 20, 1879; ratifications exchanged April 8, 1879; proclaimed April 8, 1879. (Treaties and Conventions, 1889, p. 621.)

U. S. Treaties 1904, p. 469; 20 Stats. at Large, 797.

This treaty containing ten articles was superseded July 17, 1899. by the treaty of November 22, 1894.

1880.

CONVENTION FOR REIMBURSING SHIPWRECK EXPENSES.

Concluded May 17, 1880; ratification advised by the Senate March 23, 1881; ratified by the President April 7, 1881; ratifications exchanged June 16, 1881; proclaimed October 3, 1881. (Treaties and Conventions, 1889, p. 624.)

U. S. Treaties 1904, p. 470; 22 Stats. at Large, 815.

1886.

EXTRADITION TREATY.

Concluded April 29, 1886; ratification advised by the Senate with amendments June 21, 1886; ratified by the President July 13, 1886; ratifications exchanged September 27, 1886; proclaimed November 3, 1886. (Treaties and Conventions, 1889, p. 625.)

U. S. Treaties 1904, p. 471; 24 Stats. at Large, 1015.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Persons under arrest.
IV. Political offenses.
V. Procedure.
VI. Temporary detention.
VII. Delivery of citizens.
VIII. Expenses.
IX. Duration; ratification.

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1894.

TREATY OF COMMERCE AND NAVIGATION.[1]

Concluded November 22, 1894; ratification advised by the Senate with amendments February 5, 1895; ratified by the President February 15, 1895; ratifications exchanged March 21, 1895; proclaimed March 21, 1895.

U. S. Treaties 1904, p. 474; 29 Stats. at Large, 848.

ARTICLES.

I. Mutual freedom of trade, travel, etc.; taxes; exemptions.
II. Commerce and navigation.
III. Inviolability of dwellings, etc.
IV. Import duties.
V. Export duties.
VI. Transit dues, etc.
VII. Equality of shipping.
VIII. Tonnage, etc., dues.
IX. Port regulations.
X. Coasting trade.
XI. Vessels in distress, shipwrecks, etc.
XII. Nationality of vessels.
XIII. Deserters from ships.
XIV. Favored nation privileges.
XV. Consular officers.
XVI. Patents, trademarks and designs.
XVII. Abolition of foreign settlements in Japan.
XVIII. Former treaties superseded.
XIX. Date of taking effect.
XX. Ratification.
Protocol.

1897.

CONVENTION AS TO PATENTS, TRADEMARKS, AND DESIGNS.

Concluded January 13, 1897; ratification advised by the Senate February 1, 1897; ratified by the President February 2, 1897; ratifications exchanged March 8, 1897; proclaimed March 9, 1897.

U. S. Treaties 1904, p. 482; 29 Stats. at Large, 860.

[1] See The Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. Rep. 611, 47 L. ed. 721.

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1905.

COPYRIGHT CONVENTION BETWEEN THE UNITED STATES AND JAPAN.

Signed at Tokio November 10, 1905; ratification advised by the Senate February 28, 1906; ratified by the President March 7, 1906; ratified by Japan April 28, 1906; ratifications exchanged at Tokio May 10, 1906; proclaimed May 17, 1906. (Treaties and Proclamations, 2890.)

Treaties and Proclamations, 2890; 34 Stats. at Large, pt. 3.

ARTICLES.

I. Reciprocal rights to citizens of each country.
II. Translation of books, etc., without authorization.
III. Ratification.

1906.

SUPPLEMENTARY CONVENTION BETWEEN THE UNITED STATES AND JAPAN FOR THE EXTRADITION OF CRIMINALS.

Signed at Tokio May 17, 1906; ratification advised by the Senate June 22, 1906; ratified by the President June 28, 1906; ratified by Japan September 22, 1906; ratifications exchanged at Tokio, September 25, 1906; proclaimed September 26, 1906.

Treaties and Proclamations, 2951; 34 Stats. at Large, pt. 3, p. 2951.

ARTICLE.

I. Extraditable crimes (adding embezzlement and larceny).

KONGO.

(CONGO.)

1884.

DECLARATION AS TO THE INTENTION OF THE INTERNATIONAL ASSOCIATION OF THE CONGO AND THE RECOGNITION OF ITS FLAG BY THE UNITED STATES, SIGNED APRIL 22, 1884. (ADVISED BY THE SENATE, APRIL 10, 1884.)

U. S. Treaties 1904, p. 483; 23 Stats. at Large, 781.

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1891.

TREATY OF AMITY, COMMERCE, AND NAVIGATION.

Concluded January 24, 1891; ratification advised by the Senate January 11, 1892; ratified by the President January 19, 1892; ratifications exchanged February 2, 1892; proclaimed April 2, 1892.

U. S. Treaties 1904, p. 484; 27 Stats. at Large, 926.

ARTICLES.

I. Freedom of commerce and navigation.
II. Property rights.
III. Exemptions of service.
IV. Religious freedom.
V. Consular officers.
VI. Shipping privileges.
VII. Transportation.
VIII. Prohibitions.
IX. (Not agreed to.)
X. Import duties.
XI. Most favored nation privileges.
XII. Other privileges.
XIII. Arbitration.
XIV. Conditions.
XV. Ratification.
Senate resolutions of ratification.

KOREA.

(COREA.)

1882.

TREATY OF PEACE, AMITY, COMMERCE AND NAVIGATION.

Concluded May 22, 1882; ratification advised by the Senate January 9, 1883; ratified by the President February 13, 1883; ratifications exchanged May 19, 1883; proclaimed June 4, 1883. (Treaties and Conventions, 1889, p. 216.)

U. S. Treaties 1904, p. 490; 23 Stats. at Large, 720.

ARTICLES.

I. Amity.
II. Diplomatic and consular privileges.
III. Asylum; shipwrecks.
IV. Protection in Korea; extraterritoriality.
V. Shipping dues; imports.
VI. Residence and travel.
VII. Opium traffic.
VIII. Exportation of breadstuffs and ginseng prohibited.
IX. Arms and ammunition.
X. Employing natives, etc.
XI. Privileges to students.
XII. Duration.
XIII. Language of correspondence.
XIV. Most favored nation privileges; ratification.

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1854.

COMPACT OF FRIENDSHIP AND COMMERCE.

Concluded July 11, 1854; ratification advised by the Senate March 3, 1855; ratified by the President March 9, 1855; proclaimed March 9, 1855. (Treaties and Conventions, 1889, p. 629.)

U. S. Treaties 1904, p. 496; 10 Stats. at Large, Treaties, 214.

LIBERIA.

1862.

TREATY OF COMMERCE AND NAVIGATION.

Concluded October 21, 1862; ratification advised by the Senate January 9, 1863; ratified by the President January 12, 1863; ratifications exchanged February 17, 1863; proclaimed March 18, 1863. (Treaties and Conventions, 1889, p. 631.)

U. S. Treaties 1904, p. 498; 12 Stats. at Large, 1245.

ARTICLES.

I. Amity.
II. Freedom of commerce.
III. No discrimination in vessels.
IV. Imports and exports.
V. Shipwrecks and salvage.
VI. Most favored nation privileges.
VII. Consuls.
VIII. Noninterference in Liberia.
IX. Ratification.

LUBEC.

(See HANSEATIC REPUBLICS.)

LUXEMBURG.

1883.

EXTRADITION CONVENTION.

Concluded October 29, 1883; ratification advised by the Senate July 4, 1884; ratified by the President July 5, 1884; ratifications exchanged July 14, 1884; proclaimed August 12, 1884. (Treaties and Conventions, 1889, p. 634.)

U. S. Treaties 1904, p. 501; 23 Stats. at Large, 808.

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ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Trials of persons surrendered.
IV. Political offenses.
V. Delivery of citizens.
VI. Persons under arrest.
VII. Procedure.
VIII. Expenses.
IX. Limitations.
X. Articles in possession of accused.
XI. Duration; ratification.

MADAGASCAR.

Madagascar having become a colony of France, the treaties of 1867 and 1881 have become obsolete.

1867.

TREATY OF COMMERCE AND NAVIGATION.

Concluded February 14, 1867; ratification advised by the Senate January 20, 1868; ratified by the President January 24, 1868; ratifications exchanged July 8, 1868; proclaimed October 1, 1868. (Treaties and Conventions, 1889, p. 638.)

U. S. Treaties 1904, p. 505; 15 Stats. at Large, 491.

This treaty, consisting of seven articles, was superseded by the treaty of 1881.

1881.

TREATY OF FRIENDSHIP AND COMMERCE.

Concluded May 13, 1881; ratification advised by the Senate February 27, 1883; ratified by the President March 10, 1883; ratifications exchanged March 12, 1883; proclaimed March 13, 1883. (Treaties and Conventions, 1889, p. 641.)

U. S. Treaties 1904, p. 505; 22 Stats. at Large, 952.

This treaty, consisting of twelve articles, became obsolete when the sovereignty of France was extended over Madagascar, and was replaced by "the whole of the conventions concluded between France and the United States."—Note of July 22, 1896, from the French Ambassador to the Secretary of State.

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MASKAT.

(See MUSCAT.)

MECKLENBURG-SCHWERIN.

(See NORTH GERMAN UNION.)

1847.

TREATY OF COMMERCE AND NAVIGATION.

Concluded December 9, 1847; ratification advised by the Senate May 18, 1848; ratified by the President May 20, 1848; proclaimed August 2, 1848. (Treaties and Conventions, 1889, p. 653.)

U. S. Treaties 1904, p. 506; 9 Stats. at Large, Treaties, 67.

ARTICLES.

I. Freedom of commerce.
II. Coasting trade.
III. No preference to vessels importing.
IV. Shipwrecks.
V. Extent of shipping privileges.
VI. Duties on imports and exports.
VII. Most favored nation commercial privileges.
VIII. Duties on cotton, rice, tobacco and whale-oil.
IX. Consular officers and functions.
X. Trade and property rights.
XI. Duration; increase of duties.

1853.

November 26, 1853, the Grand Duchy of Mecklenburg-Schwerin acceded to the extradition treaty of 1852 between the United States and Prussia and other states of the Germanic Confederation.

U. S. Treaties 1904, p. 512; 10 Stats. at Large, Treaties, 105.

MECKLENBURG-STRELITZ.

(See NORTH GERMAN UNION.)

1853.

December 2, 1853, the Grand Duchy of Mecklenburg-Strelitz acceded to the extradition treaty of 1852 between the United States and Prussia and other states of the Germanic Confederation.

U. S. Treaties 1907, p. 512; 10 Stats. at Large, Treaties, 104.

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MEXICO.

1828.

TREATY OF LIMITS.

Concluded January 12, 1828; ratification advised by the Senate April 4, 1832; ratified by the President April 5, 1832; ratifications exchanged April 5, 1832; proclaimed April 5, 1832. (Treaties and Conventions, 1889, p. 661.)

U. S. Treaties 1904, p. 513; 8 Stats. at Large, 372.

This treaty of three articles confirmed the boundaries set out in the treaty with Spain, 1819, and provided for a commission to run the line, which was never appointed. The accession of Texas and the war with the United States and Mexico rendered the treaty inoperative.

1831.

TREATY OF LIMITS.

Concluded April 5, 1831; ratification advised by the Senate April 4, 1832; ratified by the President April 5, 1832; ratifications exchanged April 5, 1832; proclaimed April 5, 1832. (Treaties and Conventions, 1889, p. 663.)

U. S. Treaties 1904, p. 513; 8 Stats. at Large, 376.

This single article extended the time for the exchange of ratifications of the treaty of 1828, and expired with it.

1831.

TREATY OF AMITY, COMMERCE, AND NAVIGATION.

Concluded April 5, 1831; ratification advised by the Senate March 23, 1832; ratified by the President April 5, 1832; ratifications exchanged April 5, 1832; proclaimed April 5, 1832. (Treaties and Conventions, 1889, p. 664.)

U. S. Treaties 1904, p. 513; 8 Stats. at Large, 410.

This treaty of thirty-four articles was suspended during the war between the United States and Mexico, 1846-47, but was revived in general by the Treaty of 1848, and finally denounced by Mexico November 30, 1881.[1]

[1] See Atocha v. United States, 8 Ct. of Cl. 427.

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1835.

TREATY OF LIMITS.

Concluded April 3, 1835; ratification advised by the Senate January 26, 1835; ratified by the President February 2, 1836; ratifications exchanged April 20, 1836; proclaimed April 21, 1836. (Treaties and Conventions, 1889, p. 675.)

U. S. Treaties 1904, p. 513; 8 Stats. at Large, 464.

This single article extended the time for the appointment of the commission to fix the boundary provided for in the Treaty of 1828, but it was never appointed.

1839.

CLAIMS CONVENTION.[1]

Concluded April 11, 1839; ratification advised by the Senate March 17, 1840; ratified by the President April 6, 1840; ratifications exchanged April 7, 1840; proclaimed April 8, 1840. (Treaties and Conventions, 1889, p. 676.)

U. S. Treaties 1904, p. 514; 8 Stats. at Large, 526.

By this treaty of fourteen articles a commission of four members and an umpire named by the King of Prussia was directed to be appointed to adjust the claims of United States citizens against Mexico. The commission held its first session in Washington, D. C., August 25, 1840, and terminated its duties February 25, 1842.

1843.

CLAIMS CONVENTION.

Concluded January 30, 1843; ratification advised by the Senate March 2, 1843; ratified by the President; ratifications exchanged March 29, 1843; proclaimed March 30, 1843. (Treaties and Conventions, 1889, p. 680.)

U. S. Treaties 1904, p. 514; 8 Stats. at Large, 578.

This treaty of seven articles provided for the payment of the awards rendered by the commission under the Treaty of 1839.

[1] See Gill v. Olwer's Exrs., 11 How. 529.

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1848.[1]

TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT.

(TREATY OF GUADALUPE HIDALGO.)

Concluded February 2, 1848; ratification advised by the Senate, with amendments, March 10, 1848; ratified by the President March 16, 1848; ratifications exchanged May 30, 1848; proclaimed July 4, 1848. (Treaties and Conventions, 1889, p. 681.)

U. S. Treaties 1904, p. 514; 9 Stats. at Large, Treaties, 108.

ARTICLES.

I. Declaration of peace.
II. Suspension of hostilities.
III. Withdrawal of troops, etc.
IV. Restoration of territory; evacuations; prisoners.
V. Boundary lines.
VI. Navigation of Gulf of California and lower Colorado River.
VII. Navigation of Gila and Bravo Rivers.
VIII. Inhabitants of ceded territory.
IX. Acquiring United States citizenship.
X. (Stricken out.)
XI. Protection against Indians.
XII. Payment for ceded lands.
XIII. Payment of claims awarded against Mexico.
XIV. Discharge of all prior claims.
XV. Ascertainment of outstanding claims.
XVI. Fortifications.
XVII. Revival of former treaties.
XVIII. Supplies for United States troops occupying Mexico.
XIX. Imports during United States occupation.
XX. Duties on imports before restoration of Mexican customs authorities.
XXI. Arbitration of future disagreements.
XXII. Rules to be observed in case of war.
XXIII. Ratification.
Protocol.

[1] See Cross v. Harrison, 16 How. 164, 14 L. ed. 889; Judson v. Corcoran, 17 How. 612, 15 L. ed. 231; McKinney v. Saviego, 18 How. 235, 15 L. ed. 365; United States v. Anguisola, 1 Wall. 352, 17 L. ed. 613; United States v. Moreno, 1 Wall. 400, 17 L. ed. 633; United States v. Yorba, 1 Wall. 412, 17 L. ed. 635; Townsend v. Greeley, 5 Wall. 326, 18 L. ed. 547; In re Atocha, 17 Wall. 439, 21 L. ed. 696; Basse v. Brownsville, 154 U. S. 610, 14 Sup. Ct. Rep. 1195, 38 L. ed. 651; Boteller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. Rep. 525, 32 L. ed. 926; Seabury v. Field, 1 McAll. 1, Fed. Cas. No. 12,574; Friedman v. Goodwin, 1 McAll. 142, Fed. Cas. No. 5119; Tobin v. Walkenshaw, 1 McAll. 186, Fed. Cas. No. 14070; Tripp v. Spring, 5 Saw. 209, Fed. Cas. No.

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1853.[1]

TREATY OF BOUNDARY, CESSION OF TERRITORY, TRANSIT OF ISTHMUS OF TEHUANTEPEC, ETC.

(GADSDEN TREATY.)

Concluded December 30, 1853; ratification advised by the Senate with amendments April 25, 1854; ratified by the President June 29, 1854; ratifications exchanged June 30, 1854; proclaimed June 30, 1854. (Treaties and Conventions, 1889, p. 694.)

U. S. Treaties 1904, p. 527; 10 Stats. at Large, Treaties, 123.

ARTICLES.

I. Boundary established; survey, etc.
II. Release of obligations as to Indians.
III. Payment for territory acquired.
IV. Navigation of Gulf of California, Colorado, and Bravo Rivers.
V. Inhabitants of ceded territory; fortifications; navigation and commerce.
VI. Recognition of land grants.
VII. Adjustment of future differences.
VIII. Transit of Tehauntepec Isthmus.
IX. Ratification.

1861.

EXTRADITION TREATY.[2]

Concluded December 11, 1861; ratification advised by the Senate with amendment April 9, 1862; ratified by the President April 11, 1862; ratifications exchanged May 20, 1862; proclaimed June 20, 1862. (Treaties and Conventions, 1889, p. 698.)

U. S. Treaties 1904, p. 531; 12 Stats. at Large, 679.

By notification from the Mexican government the treaty was abrogated January 24, 1899.

14,180; Atocha v. United States, 8 Ct. of Cl. 427; Crystal Springs Land and Water Co. v. Los Angeles, 76 Fed. 148; In re Rodreguez, 81 Fed. 337; Hooker v. Los Angeles, 188 U. S. 314, 23 Sup. Ct. Rep. 395, 47 L. ed. 487; Sena v. United States, 189 U. S. 233, 23 Sup. Ct. Rep. 596, 47 L. ed. 787.

[1] See In re Rodriguez, 81 Fed. 337.

[2] See Benson v. McMahon, 127 U. S. 457, 8 Sup. Ct. Rep. 1240, 32 L. ed. 234; Ornelas v. Ruiz, 161 U. S. 502, 16 Sup. Ct. Rep. 689, 40 L. ed. 787; Ex parte Coy, 32 Fed. 911; In re Benson, 34 Fed. 649; Ex parte McCabe, 46 Fed. 363, 12 L. R. A. 589; In re Rowe, 77 Fed. 161, 23 C. C. A. 103.

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1868.

CLAIMS CONVENTION.[1]

Concluded July 4, 1868; ratification advised by the Senate July 25, 1868; ratified by the President January 25, 1869; ratifications exchanged February 1, 1869; proclaimed February 1, 1869. (Treaties and Conventions, 1889, p. 700.)

U. S. Treaties 1904, p. 531; 15 Stats. at Large, 679.

Under this convention of seven articles a joint commission was appointed to consider mutual claims, consisting of one commissioner for each country, who together chose an umpire. The first meeting took place August 10, 1869, considered to have been held July 31, 1869. The final session was January 31, 1876. The awards rendered were: In favor of citizens of the United States, $4,125,622.20; and in favor of citizens of Mexico, $150,498.41.

1868.

NATURALIZATION CONVENTION.[2]

Concluded July 10, 1868; ratification advised by the Senate July 25, 1868; ratified by the President January 27, 1869; ratifications exchanged February 1, 1869; proclaimed February 1, 1869. (Treaties and Conventions, 1889, p. 704.)

U. S. Treaties 1904, p. 532; 15 Stats. at Large, 687.

This convention of six articles was terminated February 11, 1882, upon notification given by Mexico.

1871.

CLAIMS CONVENTION.

Concluded April 19, 1871; ratification advised by the Senate December 11, 1871; ratified by the President December 15, 1871; ratifications exchanged February 8, 1872; proclaimed February 8, 1872. (Treaties and Conventions, 1889, p. 705.)

U. S. Treaties 1904, p. 532; 17 Stats. at Large, 861.

[1] See Frelinghuysen v. Key, 110 U. S. 63, 3 Sup. Ct. Rep. 462, 28 L. ed. 71; Alling v. United States, 114 U. S. 562, 5 Sup. Ct. Rep. 1080, 29 L. ed. 272; United States ex rel. Boynton v. Blaine, 139 U. S. 306, 11 Sup. Ct. Rep. 607, 35 L. ed. 183; United States ex rel. Key v. Frelinghuysen, 2 Mackey (D. C.), 299.

[2] See In re Rodriguez, 81 Fed. 337.

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By this convention of two articles the duration of the claims commission organized under the convention of 1868 was extended one year.

1872.

CLAIMS CONVENTION.

Concluded November 27, 1872; ratification advised by the Senate with amendment March 9, 1873; ratified by the President March 10, 1873; ratifications exchanged July 17, 1873; proclaimed July 24, 1873. (Treaties and Conventions, 1889, p. 706.)

U. S. Treaties 1904, p. 532; 18 Stats. at Large, Treaties, 76.

The time for the completion of the labors of the claims commission under the convention of 1868 was further extended by this convention for another year.

1874.

CLAIMS CONVENTION.

Concluded November 20, 1874; ratification advised by the Senate January 20, 1875; ratified by the President January 22, 1875; ratifications exchanged January 28, 1875; proclaimed January 28, 1875. (Treaties and Conventions, 1889, p. 707.)

U. S. Treaties 1904, p. 532; 18 Stats. at Large, Treaties, 149.

The claims commission under the convention of 1868 was still further extended by this convention for another year.

1876.

CLAIMS CONVENTION.

Concluded April 29, 1876; ratification advised by the Senate May 24, 1876; ratified by the President June 27, 1876; ratifications exchanged June 29, 1876; proclaimed June 29, 1876. (Treaties and Conventions, 1889, p. 709.)

U. S. Treaties 1904, p. 533; 19 Stats. at Large, Treaties, 86.

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The functions of the umpire under the convention of 1868 were extended by this convention of three articles until November 20, 1876, and provision made for the payment of the awards.

1882.

BOUNDARY CONVENTION.

Concluded July 29, 1882; ratification advised by the Senate August 8, 1882; ratified by the President January 29, 1883; ratifications exchanged March 3, 1883; proclaimed March 5, 1883. (Treaties and Conventions, 1889, p. 711.)

U. S. Treaties 1904, p. 533; 22 Stats. at Large, 986.

(This convention, although temporary in its character, is referred to because Article IX provides for the punishment of persons destroying or defacing the monuments marking the boundary.)

ARTICLES.

I. Preliminary reconnaissance.
II. International Boundary Commission authorized.
III. Powers of commission.
IV. Boundary monuments.
V. Reports of commission.
VI. Expenses.
VII. Payment for monuments.
VIII. Duration of commission.
IX. Protection of monuments; ratification.

1883.

COMMERCIAL RECIPROCITY CONVENTION.

Concluded January 20, 1883; ratification advised by the Senate with amendments March 11, 1884; ratified by the President May 20, 1884; ratifications exchanged May 20, 1884; proclaimed June 2, 1884. (Treaties and Conventions, 1889, p. 714.)

U. S. Treaties 1904, p. 536; 24 Stats. at Large, 975.

This convention of ten articles made mutual agreements for the importation of certain products of each country into the other free of duty.

Owing to the failure of legislation to carry the convention into effect it ceased to be operative May 20, 1887.

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1884.

BOUNDARY CONVENTION, RIO GRANDE AND RIO COLORADO.

Concluded November 12, 1884; ratification advised by the Senate March 18, 1885; modifications consented to by the Senate June 23, 1886; ratified by the President July 10, 1886; ratifications exchanged September 13, 1886; proclaimed September 14, 1886. (Treaties and Conventions, 1889, p. 721.)

U. S. Treaties 1904, p. 536; 24 Stats. at Large, 1011.

ARTICLES.

I. Boundaries in rivers named.
II. Changes.
III. Artificial changes.
IV. Bridges.
V. Riparian rights.
VI. Ratification.

1885.

RECIPROCITY CONVENTION.

Concluded February 25, 1885; ratification advised by the Senate March 20, 1885; ratified by the President November 12, 1885; ratifications exchanged November 27, 1885; proclaimed May 1, 1886. (Treaties and Conventions, 1889, p. 722.)

U. S. Treaties 1904, p. 538; 25 Stats. at Large, 1370.

The time for the enactment of legislation to carry into effect the convention of 1883 was extended by this convention to May 20, 1886.

1885.

BOUNDARY CONVENTION.

Concluded December 5, 1885; ratification advised by the Senate with amendment June 21, 1886; ratified by the President June 23, 1887; ratifications exchanged June 27, 1887; proclaimed June 28, 1887. (Treaties and Conventions, 1889, p. 1189.)

U. S. Treaties 1904, p. 538; 25 Stats. at Large, 1390.

The time for completing the work of the Boundary Commission authorized under the convention of 1882 was extended eighteen months by this convention.

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1886.

RECIPROCITY CONVENTION.

Concluded May 14, 1886; ratification advised by the Senate January 7, 1887; ratified by the President January 24, 1887; ratifications exchanged January 29, 1887; proclaimed February 1, 1887. (Treaties and Conventions, 1889, p. 1190.)

U. S. Treaties 1904, p. 539; 24 Stats. at Large, 1018.

The time for the enactment of legislation to carry the convention of 1883 into effect was further extended by this convention to May 20, 1887.

1889.

BOUNDARY CONVENTION.

Concluded February 18, 1889; ratification advised by the Senate March 26, 1889; ratified by the President April 30, 1889; ratifications exchanged October 12, 1889; proclaimed October 14, 1889.

U. S. Treaties 1904, p. 539; 26 Stats. at Large, 1493.

Owing to the failure to appoint the commission authorized by the convention of 1882, within the time specified, as extended by the convention of 1885, it ceased to have effect. By this convention the provisions of the convention of 1882 were revived for a period of five years from the date of the exchange of ratifications.

1889.

BOUNDARY CONVENTION.

Concluded March 1, 1889; ratification advised by the Senate May 7, 1890; ratified by the President December 6, 1890; ratifications exchanged December 24, 1890; proclaimed December 26, 1890.

U. S. Treaties 1904, p. 539; 26 Stats. at Large, 1512.

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ARTICLES.

I. International Boundary Commission authorized.
II. Composition.
III. Meetings of Commission.
IV. Duties.
V. Investigation of works on banks of Colorado and Rio Grande.
VI. Examinations.
VII. Jurisdiction.
VIII. Decisions.
IX. Ratification.

1894.

BOUNDARY CONVENTION.

Concluded August 24, 1894; ratification advised by the Senate August 27, 1894; ratified by the President September 1, 1894; ratifications exchanged October 11, 1894; proclaimed October 18, 1894.

U. S. Treaties 1904, p. 542; 28 Stats. at Large, 841.

The period for the completion of the work of the Boundary Commission under convention of 1889 was extended by this convention two years from October 11, 1894.

1895.

BOUNDARY CONVENTION.

Concluded October 1, 1895; ratification advised by the Senate December 17, 1895; ratified by the President December 20, 1895; ratifications exchanged December 21, 1895; proclaimed December 21, 1895.

U. S. Treaties 1904, p. 542; 29 Stats. at Large, 841.

The duration of the convention of 1889 was extended one year by this convention.

1896.

BOUNDARY CONVENTION.

Concluded November 6, 1896; ratification advised by the Senate December 10, 1896; ratified by the President December 15, 1896; ratifications exchanged December 23, 1896; proclaimed December 23, 1896.

U. S. Treaties 1904, p. 542; 29 Stats. at Large, 857.

The convention of 1889 was further extended to December 24, 1897, by this convention.

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1897.

BOUNDARY CONVENTION.

Concluded October 29, 1897; ratification advised by the Senate December 16, 1897; ratified by the President December 20, 1897; ratifications exchanged December 21, 1897; proclaimed December 21, 1897.

U. S. Treaties 1904, p. 543; 30 Stats. at Large, 1625.

This convention further extended the duration of the convention of 1889 to December 24, 1898.

1898.

BOUNDARY CONVENTION.

Concluded December 2, 1898; ratification advised by the Senate December 8, 1898; ratified by the President December 12, 1898; ratifications exchanged February 2, 1899; proclaimed February 3, 1899.

U. S. Treaties 1904, p. 543; 30 Stats. at Large, 1744.

The convention of 1889 was again extended one year by this convention.

1899.

EXTRADITION TREATY.

Concluded February 22, 1899; ratification advised by Senate March 2, 1899; ratified by President March 8, 1899; ratifications exchanged April 22, 1899; proclaimed April 24, 1899.

U. S. Treaties 1904, p. 543; 31 Stats. at Large, 1818.

ARTICLES.

I. Delivery of accused.
II. Extraditable offenses.
III. Nonextradition.
IV. Nondelivery of citizens.
V. Deferring extradition.
VI. Persons claimed by other countries.
VII. Political offenses.
VIII. Procedure.
IX. Frontier States.
X. Provisional detention.
XI. Officers surrendering government.
XII. Prior offenses.
XIII. Trial; punishment; third country.
XIV. Expenses.
XV. Property found on fugitive.
XVI. Transit over territory of third country.
XVII. Crimes by citizens of one against other contracting power.
XVIII. Effect.
XIX. Duration; ratification.

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1899.

BOUNDARY CONVENTION.

Concluded December 22, 1899; ratification advised by Senate February 8, 1900; ratified by President February 14, 1900; ratifications exchanged May 5, 1900; proclaimed May 7, 1900.

U. S. Treaties 1904, p. 550.

This convention further extended the duration of the convention of March 1, 1889, for one year.

1900.

WATER BOUNDARY CONVENTION.

Concluded November 21, 1900; ratification advised by Senate December 15, 1900; ratified by President December 24, 1900; ratifications exchanged December 24, 1900; proclaimed December 24, 1900.

U. S. Treaties 1904, p. 550; 31 Stats. at Large, 1936.

1902.

SUPPLEMENTARY EXTRADITION CONVENTION.

Concluded June 25, 1902; ratification advised by Senate March 11, 1903; ratified by President March 18, 1903; ratifications exchanged March 28, 1903; proclaimed April 3, 1903.

U. S. Treaties 1904, p. 551.

ARTICLE.

Extraditable offense; bribery.

1906.

CONVENTION BETWEEN THE UNITED STATES AND MEXICO PROVIDING FOR THE EQUITABLE DISTRIBUTION OF THE WATERS OF THE RIO GRANDE FOR IRRIGATION PURPOSES.

Signed at Washington May 21, 1906; ratification advised by the Senate June 26, 1906; ratified by the President December 26, 1906; ratified by Mexico January 5, 1907; ratifications exchanged at Washington, January 16, 1907; proclaimed January 16, 1907.

Treaties and Proclamations, 2953; 34 Stats. at Large, pt. 3, p. 2953.

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MOROCCO.

1787.

TREATY OF PEACE AND FRIENDSHIP.

Concluded January, 1787; ratified by the Continental Congress July 18, 1787. (Treaties and Conventions, 1889, p. 724.)

U. S. Treaties 1904, p. 553; 8 Stats. at Large, 100.

This treaty of twenty-six articles, negotiated by Thos. Barclay and signed by John Adams and Thom. Jefferson, was superseded by the following Treaty of 1836.

1836.

TREATY OF PEACE AND FRIENDSHIP.

Concluded September 16, 1836; ratification advised by the Senate January 17, 1837; ratified by the President January 28, 1837; proclaimed January 30, 1837. (Treaties and Conventions, 1889, p. 729.)

U. S. Treaties 1904, p. 553; 8 Stats. at Large, 484.

ARTICLES.

I. Emperor's consent.
II. No service with an enemy.
III. Captures.
IV. Ships' passports.
V. Right of search.
VI. Release of captives.
VII. Supplies to vessels.
VIII. Repairs to vessels.
IX. Shipwrecks.
X. Protection of warships.
XI. Immunities of ports.
XII. Freedom of warships.
XIII. Salutes.
XIV. Most favored nation commerce.
XV. Privileges to merchants.
XVI. Exchange of prisoners.
XVII. Trade privileges.
XVIII. Examination of exports.
XIX. No detention, etc., of vessels.
XX. Consul to decide disputes in Morocco.
XXI. Trials of homicides and assaults.
XXII. Estates of deceased Americans.
XXIII. Consular privileges.
XXIV. Agreement in case of differences; most favored nation privileges.
XXV. Duration.

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1865.

CONVENTION AS TO CAPE SPARTEL LIGHTHOUSE.

Concluded between the United States, Austria, Belgium, France, Great Britain, Italy, the Netherlands, Portugal, Spain, and Sweden and Norway, and Morocco, May 31, 1865; ratification advised by the Senate July 5, 1866; ratified by the President July 14, 1866; ratifications exchanged February 14, 1867; proclaimed March 12, 1867. (Treaties and Conventions, 1889, p. 734.)

U. S. Treaties 1904, p. 558; 14 Stats. at Large, 679.

ARTICLES.

I. Administration of the lighthouse.
II. Expense of maintenance.
III. Protection.
IV. Management.
V. Duration.
VI. Regulations.
VII. Ratification.

1880.

CONVENTION AS TO PROTECTION.

Concluded between the United States, Germany, Austria, Belgium, Denmark, Spain, France, Great Britain, Italy, the Netherlands, Portugal and Sweden and Norway and Morocco, July 3, 1880; ratification advised by the Senate May 5, 1881; ratified by the President May 10, 1881; proclaimed December 21, 1881. (Treaties and Conventions, 1889, p. 737.)

U. S. Treaties 1904, p. 561; 22 Stats. at Large, 817.

ARTICLES.

I. Conditions of protection.
II. Employees of legations.
III. Consular employees.
IV. Diplomatic rights; suits; prosecutions.
V. Native consular agents.
VI. Extent of protection.
VII. Names to be furnished by legations.
VIII. Names to be furnished by consulates.
IX. Classes not protected.
X. Brokers.
XI. Property rights.
XII. Agricultural tax.
XIII. Gate tax.
XIV. Mediation of native employees.
XV. Naturalization.
XVI. Limitation of protection.
XVII. Most favored nation treatment.
XVIII. Ratification.

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1899.

AGREEMENT BY EXCHANGE OF NOTES WITH GREAT BRITAIN FOR THE PROTECTION OF TRADEMARKS IN MOROCCO.

Concluded December 6, 1899.

U. S. Treaties 1904, p. 567.

1901.

AGREEMENT BY EXCHANGE OF NOTES WITH GERMANY FOR THE RECIPROCAL PROTECTION OF TRADEMARKS IN MOROCCO.

Concluded September 28—October 8, 1901.

U. S. Treaties 1904, p. 569.

MUSCAT.

1833.

TREATY OF AMITY AND COMMERCE.

Concluded September 21, 1833; ratification advised by the Senate June 23, 1834; ratified by the President; ratifications exchanged September 30, 1835; proclaimed June 24, 1837. (Treaties and Conventions, 1889, p. 744.)

U. S. Treaties 1904, p. 570; 8 Stats. at Large, 458.

This treaty was accepted by the Sultan of Zanzibar after the separation of that state from Muscat, and its Article III is amended by the treaty of June 5, 1903, between the United States and Great Britain, acting in the name of the Sultan of Zanzibar.

ARTICLES.

I. Peace.
II. Freedom of trade.
III. Duties payable by American ships.
IV. Duties, licenses and charges.
V. Shipwrecks.
VI. Exemption from tax on trade.
VII. Captures by pirates.
VIII. Shipping charges in the United States.
IX. Consular powers and immunities.
Ratification.

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NASSAU.

(See PRUSSIA.)

1846.

CONVENTION ABOLISHING DROIT D'AUBAINE AND EMIGRATION TAXES.

Concluded May 27, 1846; ratification advised by the Senate July 21, 1846; ratified by the President July 23, 1846; ratifications exchanged October 13, 1846; proclaimed January 26, 1847. (Treaties and Conventions, 1889, p. 747.)

U. S. Treaties 1904, p. 573; 9 Stats. at Large, Treaties, 48.

Nassau was merged with Prussia by conquest 1866.

NETHERLANDS.

1782.

TREATY OF PEACE AND COMMERCE.

Concluded October 8, 1782; ratified by the Continental Congress January 22, 1783. (Treaties and Conventions, 1889, p. 749.)

U. S. Treaties 1904, p. 574; 8 Stats. at Large, 32.

This treaty of twenty-nine articles was abrogated by the overthrow of the Netherlands government in 1795.

1782.

CONVENTION RELATIVE TO RECAPTURED VESSELS.

Concluded October 8, 1782; ratified by the Continental Congress January 23, 1783. (Treaties and Conventions, 1889, p. 759.)

U. S. Treaties 1904, p. 574; 8 Stats. at Large, 50.

This convention of six articles was abrogated by the overthrow of the Netherlands government in 1795.

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1839.

TREATY OF COMMERCE AND NAVIGATION.

Concluded January 19, 1839; ratification advised by the Senate January 31, 1839; ratified by the President February 1, 1839; ratifications exchanged May 23, 1839; proclaimed May 24, 1839. (Treaties and Conventions, 1889, p. 761.)

U. S. Treaties 1904, p. 574; 8 Stats. at Large, 524.

ARTICLES.

I. Import and export duties, drawbacks, etc.
II. Shipping charges.
III. Consular officers.
IV. Nationality of ships.
V. Shipwrecks.
VI. Duration.
VII. Ratification.

1852.

CONVENTION OF COMMERCE AND NAVIGATION.

Concluded August 26, 1852; ratification advised by the Senate February 17, 1853; ratified by the President February 21, 1853; ratifications exchanged February 25, 1853; proclaimed February 26, 1853. (Treaties and Conventions, 1889, p. 763.)

U. S. Treaties 1904, p. 576; 10 Stats. at Large, Treaties, 66.

ARTICLES.

I. Import and export duties, bounties, drawbacks, etc.
II. Trade with colonies of the Netherlands.
III. Shipping dues.
IV. Coasting trade and fisheries.
V. Discriminations in favor of direct trade.
VI. Duration and extent.
VII. Ratification.

1855.

CONSULAR CONVENTION.

Concluded January 22, 1855; ratification advised by the Senate March 3, 1855; ratified by the President March 5, 1855; ratifications exchanged May 25, 1855; proclaimed May 26, 1855. (Treaties and Conventions, 1889, p. 765.)

U. S. Treaties 1904, p. 578.

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By this convention consuls were received into the colonies of the Netherlands. It was abrogated August 20, 1879, being superseded by the convention of 1878.

1878.

CONSULAR CONVENTION.

Concluded May 23, 1878; ratification advised by the Senate June 6, 1878; ratified by the President June 21, 1878; time for exchange of ratifications extended by the Senate January 29, 1879, and May 8, 1879; ratifications exchanged July 31, 1879; proclaimed August 1, 1879. (Treaties and Conventions, 1889, p. 769.)

U. S. Treaties 1904, p. 579; 21 Stats. at Large, 662.

ARTICLES.

I. Consular officers authorized.
II. Commissions and exequaturs.
III. Exemptions and privileges.
IV. Testimony by consular officers.
V. Arms and flags.
VI. Inviolability of archives.
VII. Acting consular officers.
VIII. Vice-consular officers and agents.
IX. Communication with authorities.
X. Rights of consular officers.
XI. Settlement of shipping disputes.
XII. Deserters from ships.
XIII. Damages at sea.
XIV. Shipwrecks and salvage.
XV. Notification of deaths.
XVI. Duration.
XVII. Ratification.

1880.

EXTRADITION CONVENTION.

Concluded May 22, 1880; ratification advised by the Senate June 15, 1880; ratified by the President June 25, 1880; ratifications exchanged June 29, 1880; proclaimed July 30, 1880. (Treaties and Conventions, 1889, p. 775.)

U. S. Treaties 1904, p. 584; 21 Stats. at Large, 769.

This convention of twelve articles was superseded by the Convention of 1887.

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1883.

TRADEMARKS.

EXCHANGE OF NOTES BETWEEN THE NETHERLANDS LEGATION AND THE DEPARTMENT OF STATE.

Dated February 10, 1883, and February 16, 1883.

U. S. Treaties 1904, p. 584.

1887.

EXTRADITION CONVENTION.

Concluded June 2, 1887; ratification advised by the Senate March 26, 1889; ratified by the President April 17, 1889; ratifications exchanged May 31, 1889; proclaimed June 21, 1889.

U. S. Treaties 1904, p. 586; 26 Stats. at Large, 1481.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Political offenses.
IV. Restrictions on trials.
V. Exemptions.
VI. Persons under arrest in country where found.
VII. Persons claimed by two or more powers.
VIII. Nondelivery of citizens.
IX. Expenses.
X. Articles found on fugitives.
XI. Procedure.
XII. Provisional arrest and detention.
XIII. Duration; ratification.

EXTRADITION WITH THE NETHERLANDS.

1904.

EXTRADITION.

Concluded January 18, 1904; ratification advised by Senate January 27, 1904; ratified by the President May 26, 1904; ratifications exchanged May 28, 1904; proclaimed May 31, 1904.

U. S. Treaties 1904, p. 950; 33 Stats. at Large, 2257.

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ARTICLES.

I. Convention applicable to possessions and colonies.
II. Extraditable crimes.
III. Procedure.
IV. Amendatory of the treaty of June 2, 1887.
V. Provisional arrest and detention.
VI. Duration; ratification.

NICARAGUA.

1867.

TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION, AND AS TO ISTHMIAN TRANSIT.

Concluded June 21, 1867; ratification advised by the Senate January 20, 1868; ratified by the President February 7, 1868; ratifications exchanged June 20, 1868; proclaimed August 13, 1868. (Treaties and Conventions, 1889, p. 779.)

U. S. Treaties 1904, p. 591; 15 Stats. at Large, 549.

This treaty, containing twenty-one articles, denounced by Nicaragua to take effect October 24, 1902.

1870.

EXTRADITION CONVENTION.

Concluded June 25, 1870; ratification advised by the Senate with amendments March 31, 1871; ratified by the President April 11. 1871; ratifications exchanged June 24, 1871; proclaimed September 19, 1871. (Treaties and Conventions, 1889, p. 787.)

U. S. Treaties 1904, p. 591; 17 Stats. at Large, 815.

This treaty, containing seven articles, denounced by Nicaragua to take effect April 24, 1902.

1900.

PROTOCOL WITH NICARAGUA FOR THE CONSTRUCTION OF AN INTEROCEANIC CANAL.

Concluded December 1, 1900.

U. S. Treaties 1904, p. 591.

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NORTH GERMAN UNION.

(See, also, GERMAN EMPIRE AND PRUSSIA.)

1868.

NATURALIZATION CONVENTION.

Concluded February 22, 1868; ratification advised by the Senate with amendment March 26, 1868; ratified by the President March 30, 1868; ratifications exchanged May 9, 1868; proclaimed May 27, 1868. (Treaties and Conventions, 1889, p. 790.)

U. S. Treaties 1904, p. 592; 15 Stats. at Large, 615.

ARTICLES.

I. Naturalization recognized.
II. Punishment for offenses prior to naturalization.
III. Extradition.
IV. Renunciation of naturalization.
V. Duration.
VI. Ratification.

NORWAY.

(See SWEDEN AND NORWAY.)

1893.

EXTRADITION CONVENTION.

Concluded June 7, 1893; ratification advised by the Senate November 1, 1893; ratified by the President November 3, 1893; ratifications exchanged November 8, 1893; proclaimed November 9, 1893.

28 Stats. at Large, 1187.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Procedure.
IV. Provisional detention.
V. Nondelivery of citizens.
VI. Political offenses.
VII. Limitations.
VIII. Prior offenses.
IX. Property seized with fugitives.
X. Persons claimed by other countries.
XI. Expenses.
XII. Duration; ratification.

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1904.

TREATY BETWEEN THE UNITED STATES AND NORWAY AMENDING THE EXTRADITION TREATY OF JUNE 7, 1893, BETWEEN THE TWO COUNTRIES.

Signed at Washington December 10, 1904; ratification advised by the Senate January 6, 1905; ratified by the President April 1, 1905; ratified by Sweden and Norway February 3, 1905; ratifications exchanged at Washington April 4, 1905; proclaimed April 6, 1905.

Treaties and Proclamations, 2865; 34 Stats. at Large, pt. 3, p. 2865.

ARTICLES.

I. Extradition of accessories from Norway. II. Exchange of ratifications.

OLDENBURG.[1]

The Duchy of Oldenburg became incorporated in the North German Union 1867. On March 10, 1847, it acceded to the treaty of commerce and navigation concluded with the Kingdom of Hanover June 10, 1846, and December 30, 1853, it acceded to the extradition treaty with Prussia and other Germanic States concluded June 16. 1852.

U. S. Treaties 1904, p. 598.

ORANGE FREE STATE.

1871.

CONVENTION OF FRIENDSHIP, COMMERCE, AND EXTRADITION.

Concluded December 22, 1871; ratification advised by the Senate April 24, 1872; ratified by the President April 27, 1872; ratifications exchanged August 18, 1873; proclaimed August 23, 1873. (Treaties and Conventions, 1889, p. 794.)

U. S. Treaties 1904, p. 599; 18 Stats. at Large, Treaties, 65.

By notification from the government of the Orange Free State this convention of fourteen articles was denounced January 4, 1895.

[1] See declaration of accession of treaty of March 10, 1846, in 9 Stats. at Large, Treaties, 66, and of treaty of June 16, 1852, in 10 Stats. at Large, Treaties, 105.

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1896.

EXTRADITION TREATY.

Concluded October 28, 1896; ratified by the Senate January 28, 1897; ratified by the President February 21, 1899; ratifications exchanged April 20, 1899; proclaimed April 21, 1899.

U. S. Treaties 1904, p. 599; 31 Stats. at Large, 1813.

This treaty, containing twelve articles, was terminated by the conquest of the Orange Free State and its incorporation into the British Empire.

OTTOMAN EMPIRE.[1]

(TURKEY.)

1830.

TREATY OF COMMERCE AND NAVIGATION.

Concluded May 7, 1830; ratification advised and time for exchange of ratifications extended by the Senate February 1, 1831; ratified by the President February 2, 1831; ratifications exchanged October 5, 1831; proclaimed February 4, 1832. (Treaties and Conventions, 1889, p. 798.)

U. S. Treaties 1904, p. 600; 8 Stats. at Large, 408.

(The text printed is a translation from the original treaty, which was in the Turkish language. Differences of opinion as to the true meaning of certain portions have been the subject of diplomatic correspondence without reaching an accord.)

ARTICLES.

I. Trade privileges.
II. Consular officers.
III. Treatment of United States merchants and vessels.
IV. Judicial treatment of United States citizens.
V. Use of United States flag.
VI. War vessels.
VII. Navigation of the Black Sea.
VIII. Ships not to be impressed.
IX. Shipwrecks.
Ratification.

[1] See Dainese v. Hale, 91 U. S. 13, 23 L. ed. 190, 1 McAr. (D. C.) 86; Dainese v. United States, 15 Ct. of Cl. 64.

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1862.

TREATY OF COMMERCE AND NAVIGATION.

Concluded February 25, 1862; ratification advised by the Senate April 9, 1862; ratified by the President April 18, 1862; ratifications exchanged June 5, 1862; proclaimed July 2, 1862. (Treaties and Conventions, 1889, p. 800.)

U. S. Treaties 1904, p. 602; 12 Stats. at Large, 1213.

This treaty of twenty-three articles it is contended has been abrogated upon notice given by the Turkish government, to date from June 5, 1884. (See notes, Treaties and Conventions, 1889, p. 1372.)

1874.

EXTRADITION TREATY.

Concluded August 11, 1874; ratification advised by the Senate January 20, 1875; ratified by the President January 22, 1875; ratifications exchanged April 22, 1875; proclaimed May 26, 1875. (Treaties and Conventions, 1889, p. 821.)

U. S. Treaties 1904, p. 603; 19 Stats. at Large, Treaties, 16.

ARTICLES.

I. Surrender of accused.
II. Extraditable crimes.
III. Political offenses.
IV. Persons under arrest.
V. Procedure.
VI. Expenses.
VII. Nondelivery of citizens.
VIII. Duration; ratification.

PANAMA.

1903.

CONVENTION FOR THE CONSTRUCTION OF A SHIP CANAL.

Concluded November 18, 1903; ratification advised by the Senate February 23, 1904; ratified by the President February 25, 1904; ratifications exchanged February 26, 1904; proclaimed February 26, 1904.

U. S. Treaties 1904, p. 609; 33 Stats. at Large, pt. 2, p. 2234.

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ARTICLES.

I. Independence of Panama.
II. Canal zone.
III. Authority in canal zone.
IV. Subsidiary rights.
V. Monopoly for construction, etc.
VI. Private property.
VII. Panama; Colon; harbors.
VIII. Panama Canal Company and railroad.
IX. Ports at entrance of canal.
X. Taxes, etc.
XI. Official dispatches.
XII. Access of employees.
XIII. Importation into zone.
XIV. Compensation.
XV. Joint commission.
XVI. Extradition.
XVII. Ports of Panama.
XVIII. Neutrality rules.
XIX. Free transport.
XX. Cancellation of existing treaties.
XXI. Anterior debts, concessions, etc.
XXII. Renunciation of rights under concessionary contracts.
XXIII. Protection of canal.
XXIV. Change in government, laws, etc.
XXV. Coaling stations.
XXVI. Ratification.

1904.

TREATY BETWEEN THE UNITED STATES AND PANAMA FOR THE MUTUAL EXTRADITION OF CRIMINALS.

Signed at the City of Panama May 25, 1904; ratification advised by the Senate January 6, 1905; ratified by the President January 20, 1905; ratified by Panama May 25, 1904; ratifications exchanged at City of Panama April 8, 1905; proclaimed May 12, 1905.

Treaties and Proclamations, 2851; 34 Stats. at Large, pt. 3.

ARTICLES.

I. Reciprocal delivery of persons charged with crime.
II. Extraditable crimes.
III. Requisitions.
IV. Application for provisional arrest.
V. Neither country bound to deliver up its own citizens.
VI. No surrender for political offenses.
VII. No delivery if trial barred by limitation.
VIII. Trial to be only for offense for which extradited.
IX. Disposal of articles seized with person.
X. Persons claimed by other countries.
XI. Expenses.
XII. Effect.
Ratification.

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PARAGUAY.

1859.

CLAIMS CONVENTION.

Concluded February 4, 1859; ratification advised by the Senate February 16, 1860; ratified by the President March 7, 1860; ratifications exchanged March 7, 1860; proclaimed March 12, 1860. (Treaties and Conventions, 1889, p. 828.)

U. S. Treaties 1904, p. 617; 12 Stats. at Large, 1087.

By this convention the claim of the United States and Paraguay Navigation Company against Paraguay was submitted to a commission of two, who met in Washington June 22, 1860, and adjourned August 13, 1860, deciding against the claim.

1859.

TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION.

Concluded February 4, 1859; ratification advised by the Senate February 27, 1860; ratified by the President March 7, 1860; ratifications exchanged March 7, 1860; proclaimed March 12, 1860. (Treaties and Conventions, 1889, p. 830.)

U. S. Treaties 1904, p. 617; 12 Stats. at Large, 1091.

ARTICLES.

I. Friendship.
II. Freedom of navigation.
III. Most favored nation commercial privileges.
IV. No discriminations of imports and exports.
V. Shipping dues.
VI. Carrying trade.
VII. Nationality of vessels.
VIII. Import and export duties.
IX. Trade privileges.
X. Property rights; estates of deceased persons.
XI. Exemption from military service, etc.
XII. Diplomatic and consular privileges.
XIII. Agreement in case of war.
XIV. Protection of property; religious freedom, etc.
XV. Duration.
XVI. Ratification.

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PERSIA.

1856.

TREATY OF FRIENDSHIP AND COMMERCE.[1]

Concluded December 13, 1856; ratification advised by the Senate March 10, 1857; ratified by the President March 12, 1857; ratifications exchanged June 13, 1857; proclaimed August 18, 1857. (Treaties and Conventions, 1889, p. 836.)

U. S. Treaties 1904, p. 622; 11 Stats. at Large, 709.

ARTICLES.

I. Friendship.
II. Diplomatic privileges.
III. Most favored nation protection.
IV. Import and export duties.
V. Trials of suits and offenses.
VI. Effects of deceased persons.
VII. Diplomatic and consular privileges.
VIII. Duration; ratification.

PERU.

1841.

CLAIMS CONVENTION.

Concluded March 17, 1841; ratification advised by the Senate January 5, 1843; ratified by the President January 12, 1843; ratification exchanged July 22, 1843; proclaimed February 21, 1844; modification consented to and time for exchange of ratifications extended by the Senate May 29, 1846; ratifications again exchanged October 31, 1846; proclaimed January 8, 1847. (Treaties and Conventions, 1889, p. 850.)

U. S. Treaties 1904, p. 626; 8 Stats. at Large, 570.

By this convention Peru agreed to pay to the United States in settlement of claims which had been presented by citizens of the United States the sum of $300,000. The claims were adjudicated by the attorney general, and the final report was made August 7, 1847, allowing claims amounting to $421,432.41.

[1] See Powers v. Comly, 101 U. S. 789, 25 L. ed. 805.

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1851.

TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION.

Concluded July 26, 1851; ratification advised by the Senate June 23, 1852; ratified by the President July 16, 1852; ratifications exchanged July 16, 1852; proclaimed July 19, 1852. (Treaties and Conventions, 1889, p. 852.)

U. S. Treaties 1904, p. 626; 10 Stats. at Large, Treaties, 28.

This treaty, consisting of forty articles, was terminated December 9, 1863, upon notice given by Peru.

1856.

CONVENTION DECLARING THE PRINCIPLES OF THE RIGHTS OF NEUTRALS AT SEA.

Concluded July 22, 1856; ratification advised by the Senate March 12, 1857; ratified by the President October 2, 1857; ratifications exchanged October 31, 1857; proclaimed November 2, 1857. (Treaties and Conventions, 1889, p. 864.)

U. S. Treaties 1904, p. 626; 11 Stats. at Large, 695.

ARTICLES.

I. Principles of neutral property rights.
II. Former treaty provisions annulled.
III. Extension of neutral rights.
IV. Accession of other countries.
V. Duration; ratification.

1857.

CONVENTION INTERPRETING ARTICLE XII, TREATY OF 1851. (Whaling ships.)

Concluded July 4, 1857; ratification advised by the Senate April 30, 1858; ratified by the President May 7, 1858; ratifications exchanged October 13, 1858; proclaimed October 14, 1858. (Treaties and Conventions, 1889, p. 886.)

U. S. Treaties 1904, p. 628; 11 Stats. at Large, 725.

By this convention amendment was made to Article XII of the Treaty of 1851 in respect to the supplies to whaling ships. The convention terminated December 9, 1863, with the Treaty of 1851.

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1862.

CLAIMS CONVENTION.

Concluded December 20, 1862; ratification advised by the Senate February 18, 1863; ratified by the President February 24, 1863; ratifications exchanged April 21, 1863; proclaimed May 19, 1863. (Treaties and Conventions, 1889, p. 868.)

U. S. Treaties 1904, p. 628; 13 Stats. at Large, 635.

The claims presented against Peru by the United States for the alleged illegal capture of the vessels "*Lizzie Thompson*" and "*Georgianna*" were by this convention referred to the arbitration of the King of Belgium, who declined to act, and the cases were dropped.

1863.

CLAIMS CONVENTION.

Concluded January 12, 1863; ratification advised by the Senate with amendment February 18, 1863; ratified by the President February 24, 1863; ratifications exchanged April 18, 1863; proclaimed May 19, 1863. (Treaties and Conventions, 1889, p. 870.)

U. S. Treaties 1904, p. 629; 13 Stats. at Large, 639.

By this convention of ten articles a commission of five was authorized, which met at Lima July 17, 1863, and completed their duties November 27, 1863. The awards against the United States were $25,300, and against Peru $57,196.23.

1868.

CLAIMS CONVENTION.

Concluded December 4, 1868; ratification advised by the Senate April 15, 1869; ratified by the President May 3, 1869; ratifications exchanged June 4, 1869; proclaimed July 6, 1869. (Treaties and Conventions, 1889, p. 872.)

U. S. Treaties 1904, p. 629; 16 Stats. at Large, 751.

This convention provided for the adjudication of mutual claims by two commissioners, who each selected an umpire. The com-

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mission met at Lima September 4, 1869, and adjourned February 26, 1870. The awards against the United States were $57,040, and against Peru, $194,417.62.

1870.

TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION.

Concluded September 6, 1870; ratification advised by the Senate March 31, 1871; ratified by the President April 11, 1871; time for exchange of ratifications extended June 5, 1873; ratifications exchanged May 28, 1874; proclaimed July 27, 1874. (Treaties and Conventions, 1889, p. 876.)

U. S. Treaties 1904, p. 629; 18 Stats. at Large, Treaties, 35.

This treaty of thirty-eight articles terminated on notice given by Peru March 31, 1886.

1870.[1]

EXTRADITION TREATY.

Concluded September 12, 1870; ratification advised by the Senate March 31, 1871; ratified by the President April 11, 1871; time for exchange of ratifications extended June 5, 1873; ratifications exchanged May 28, 1874; proclaimed July 27, 1874. (Treaties and Conventions, 1889, p. 888.)

U. S. Treaties 1904, p. 629; 18 Stats. at Large, Treaties, 35.

This treaty of ten articles terminated March 31, 1886, on notice given by Peru.

1887.

TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION.

Concluded August 31, 1887; ratification advised by the Senate with amendment May 10, 1888; ratified by the President June 6, 1888; ratifications exchanged October 1, 1888; proclaimed November 7, 1888. (Treaties and Conventions, 1889, p. 1191.)

U. S. Treaties 1904, p. 630; 25 Stats. at Large, 1444.

This treaty, containing thirty-five articles, terminated November 1, 1899, by notification from Peru, October 8, 1898.

[1] See Ker v. Illinois, 119 U. S. 421; Ex parte Ker, 18 Fed. 167. 436, 7 Sup. Ct. Rep. 225, 30 L. ed.

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1889.

EXTRADITION TREATY.

Concluded November 28, 1899; ratified by the Senate February 8, 1900; ratified by the President November 23, 1900; ratifications exchanged January 23, 1901; proclaimed January 29, 1901.

31 Stats. at Large, 1921.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Procedure.
IV. Provisional detention.
V. Nondelivery of citizens.
VI. Political offenses.
VII. Limitations.
VIII. Extradition deferred.
IX. Prior offenses.
X. Property seized with fugitive.
XI. Persons claimed by other countries.
XII. Expenses.
XIII. Duration; ratification.

PERU—BOLIVIA.

1836.

CONVENTION OF PEACE, FRIENDSHIP, COMMERCE, AND NAVIGATION.

Concluded November 30, 1836; ratification advised by the Senate October 10, 1837; ratified by the President October 14, 1837; ratifications exchanged May 28, 1838; proclaimed October 3, 1838. (Treaties and Conventions, 1889, p. 840.)

U. S. Treaties 1904, p. 634; 8 Stats. at Large, 487.

This convention terminated by the dissolution of the Peru-Bolivia Confederation in 1839.

PORTUGAL.

1840.

TREATY OF COMMERCE AND NAVIGATION.[1]

Concluded August 26, 1840; ratification advised by the Senate February 3, 1841; ratified by the President April 23, 1841; ratifications exchanged April 23, 1841; proclaimed April 24, 1841. (Treaties and Conventions, 1889, p. 891.)

U. S. Treaties 1904, p. 635; 8 Stats. at Large, 560.

This general treaty of fourteen articles was terminated by notice of the Portuguese government January 31, 1892.

[1] See Oldfield v. Marriott, 10 How. 146, 13 L. ed. 364.

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1851.

CLAIMS CONVENTION.

Concluded February 26, 1851; ratification advised by the Senate March 7, 1851; ratified by the President March 10, 1851; ratifications exchanged June 23, 1851; proclaimed September 1, 1851. (Treaties and Conventions, 1889, p. 896.)

U. S. Treaties 1904, p. 635; 10 Stats. at Large, Treaties, 91.

By this convention Portugal agreed to pay the United States $91,727 in full for all claims of American citizens against Portugal, except the claim of the brig "*General Armstrong,*" which was referred to an arbitrator. Louis Napoleon, President of France, was appointed arbitrator of the "*General Armstrong*" claim, and November 30, 1852, decided that no indemnity was due from Portugal to the United States on account of the claim.

1900.

RECIPROCAL COMMERCIAL ARRANGEMENT WITH PORTUGAL.

Signed May 22, 1899; proclaimed June 12, 1900.

U. S. Treaties 1904, p. 635; 31 Stats. at Large, 1913, 1974.

ARTICLES.

I. Concessions by United States.
II. Concessions by Portugal.
III. Termination.
IV. Ratification.

PRUSSIA.

(See, also, GERMAN EMPIRE AND NORTH GERMAN UNION.)

1785.

TREATY OF AMITY AND COMMERCE.

Concluded September 10, 1785; ratified by the Congress of the United States May 17, 1786; ratifications exchanged October, 1786. (Treaties and Conventions, 1889, p. 899.)

U. S. Treaties 1904, p. 636; 8 Stats. at Large, 84.

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This treaty of twenty-seven articles expired by its own limitations October, 1796, but Article XII was revived by Article XII of the Treaty of 1828. This article relates to the neutrality of vessels.

1799.

TREATY OF AMITY AND COMMERCE.

Concluded July 11, 1799; ratification advised by the Senate February 18, 1800; ratified by the President February 19, 1800; ratifications exchanged June 22, 1800; proclaimed November 4, 1800. (Treaties and Conventions, 1889, p. 907.)

U. S. Treaties 1904, p. 636; 8 Stats. at Large, 162.

This treaty expired by its own limitations June 22, 1810; but the provisions of the articles printed hereunder were revived by Article XII of the Treaty of May 1, 1828.

ARTICLES.

XIII. Detention of contraband goods.
XIV. Ships papers in time of war.
XV. Visit to neutral ships.
XVI. Embargoes, seizures, etc.
XVII. Restoration of neutral ships.
XVIII. Asylum to vessels in distress.
XIX. Prizes.
XX. Letters of marque.
XXI. Rules in case of war with common enemy.
XXII. Mutual protection of ships against common enemy.
XXIII. Protection in case of war.
XXIV. Treatment of prisoners of war.

1828.

TREATY OF COMMERCE AND NAVIGATION.[1]

Concluded May 1, 1828; ratification advised by the Senate May 14, 1828; ratified by the President; ratification again advised and time for exchange of ratification extended by the Senate March 9, 1829; ratifications exchanged March 14, 1829; proclaimed March 14, 1829. (Treaties and Conventions, 1889, p. 916.)

U. S. Treaties 1904, p. 643; 8 Stats. at Large, 378.

[1] See Ex parte Newman, 14 Wall. 152, 20 L. ed. 877; United States v. Diekelman, 92 U. S. 520, 23 L. ed. 742; The Elwine Kreplin, 4 Ben. 417, Fed. Cas. No. 4427, 9 Blatchf. 438, Fed. Cas. No. 4426; North German Lloyd S. S. Co. v. Hedden, 43 Fed. 17; Diekelman v. United States, 8 Ct. of Cl. 371.

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ARTICLES.

I. Freedom of commerce and navigation.
II. No discrimination of shipping charges.
III. No discrimination in import duties on account of vessels.
IV. Application of two preceding sections.
V. No discrimination of import duties.
VI. No discrimination of export duties.
VII. Coastwise trade.
VIII. No preference to importing vessel.
IX. Most favored nation commercial privileges.
X. Consular privileges and jurisdiction.
XI. Deserters from ships.
XII. Articles of former treaties revived.
XIII. Blockades.
XIV. Estates of deceased persons.
XV. Duration.
XVI. Ratification.

1852.

EXTRADITION CONVENTION.[1]

Concluded June 16, 1852; ratification advised by the Senate March 15, 1853; ratified by the President May 27, 1853; ratifications exchanged May 30, 1853; proclaimed June 1, 1853. (Treaties and Conventions, 1889, p. 921.)

U. S. Treaties 1904, p. 648.

(This treaty was concluded by the King of Prussia for the Kingdom of Prussia and other states of the Germanic Confederation therein named. It was acceded to by the following German states: Bremen, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg, Schaumburg-Lippe, and Württemberg.)

ARTICLES.

I. Extraditable crimes; procedure.
II. Accession of other German States.
III. Nondelivery of citizens.
IV. Persons under trial.
V. Duration.
VI. Ratification.

[1] See In re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6369; In re Stupp, 11 Blatchf. 124, Fed. Cas. No. 13,562; In re Wiegand, 14 Blatchf. 370, Fed. Cas. No. 17,618; In re Behrendt, 22 Fed. 699, 23 Blatchf. 40; In re Risch, 36 Fed. 546; In re Krozanker, 44 Fed. 482; Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. Rep. 484, 46 L. ed. 534.

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ROUMANIA.

1881.

CONSULAR CONVENTION.

Concluded June 17, 1881; ratification advised by the Senate April 3, 1882; ratified by the President April 6, 1882; ratifications exchanged June 13, 1883; proclaimed July 9, 1883. (Treaties and Conventions, 1889, p. 925.)

U. S. Treaties 1904, p. 652; 23 Stats. at Large, 711.

ARTICLES.

I. Consular officers.
II. Most favored nation consular privileges.
III. Exemptions.
IV. Testimony by consuls.
V. Arms and flags.
VI. Immunities of offices and archives.
VII. Acting officers.
VIII. Vice-consuls and agents.
X. Applications to authorities.
X. Notarial powers.
XI. Shipping disputes.
XII. Deserters from ships.
XIII. Damages to vessels at sea.
XIV. Shipwrecks and salvage.
XV. Estates of deceased persons.
XVI. Duration; ratification.

1906.

CONVENTION BETWEEN THE UNITED STATES AND ROUMANIA FOR THE RECIPROCAL PROTECTION OF TRADEMARKS.

Signed at Bucharest March 18-31, 1906; ratification advised by the Senate May 4, 1906; ratified by the President May 10, 1906; ratified by Roumania June 20, 1906; ratifications exchanged at Bucharest June 21, 1906; proclaimed June 25, 1906.

Treaties and Proclamations, 2901; 34 Stats. at Large, pt. 3, 2901.

ARTICLES.

I. Reciprocal rights of citizens of each country.
II. Conforming to laws and regulations.
III. Effect.

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RUSSIA.

1824.

CONVENTION AS TO THE PACIFIC OCEAN AND NORTHWEST COAST OF AMERICA.

Concluded April 17, 1824; ratification advised by the Senate January 5, 1825; ratified by the President January 7, 1825; ratifications exchanged January 11, 1825; proclaimed January 12, 1825. (Treaties and Conventions, 1889, p. 931.)

U. S. Treaties 1904, p. 657; 8 Stats. at Large, 302.

(In the treaty volumes the translation is from the original, which is in the French language.)

ARTICLES.

I. Navigation, fishing, and trading.
II. Illicit trade.
III. Mutual limit of occupation of northwest coast.
IV. Temporary fishing and trading agreement.
V. Sale of liquors and firearms prohibited.
VI. Ratification.

1832.

TREATY OF COMMERCE AND NAVIGATION.

Concluded December 18, 1832; ratification advised by the Senate February 27, 1833; ratified by the President April 8, 1833; ratifications exchanged May 11, 1833; proclaimed May 11, 1833. (Treaties and Conventions, 1889, p. 933.)

U. S. Treaties 1904, p. 659; 8 Stats. at Large, 444.

ARTICLES.

I. Freedom of commerce and navigation.
II. Reciprocal treatment of vessels.
III. No discrimination on account of vessels importing.
IV. Application of two preceding articles.
V. Export duties.
VI. Import duties.
VII. Coastwise trade.
VIII. Consular officers and powers.
IX. Deserters from ships.
X. Estates of deceased persons.
XI. Most favored nation commercial privileges.
XII. Duration.
XIII. Ratification.
Separate article: Trade with Prussia, Sweden, Norway, Poland, and Finland.

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1854.

CONVENTION AS TO RIGHTS OF NEUTRALS AT SEA.

Concluded July 22, 1854; ratification advised by the Senate July 25, 1854; ratified by the President August 12, 1854; ratifications exchanged October 31, 1854; proclaimed November 1, 1854. (Treaties and Conventions, 1889, p. 938.)

U. S. Treaties 1904, p. 664; 10 Stats. at Large, Treaties, 215.

ARTICLES.

I. Principles of free ships and neutral property.
II. Extension of principles.
III. Accession of other nations.
IV. Ratification.

1867.

CONVENTION CEDING ALASKA.[1]

Concluded March 30, 1867; ratification advised by the Senate April 9, 1867; ratified by the President May 28, 1867; ratifications exchanged June 20, 1867; proclaimed June 20, 1867. (Treaties and Conventions, 1889, p. 939.)

U. S. Treaties 1904, p. 666; 15 Stats. at Large, 539.

ARTICLES.

I. Territory ceded; boundaries.
II. Public property ceded.
III. Citizenship of inhabitants; uncivilized tribes.
IV. Formal delivery.
V. Withdrawal of troops.
VI. Payment; effect of cession.
VII. Ratification.

1868.

ADDITIONAL ARTICLE TO TREATY OF COMMERCE, 1832. TRADEMARKS.

Concluded January 27, 1868; ratification advised by the Senate July 25, 1868; ratified by the President August 14, 1868; ratifications exchanged September 21, 1868; proclaimed October 15, 1868. (Treaties and Conventions, 1889, p. 942.)

U. S. Treaties 1904, p. 669; 16 Stats. at Large, 725.

ARTICLE.—COUNTERFEITING OF TRADEMARKS PROHIBITED; REGISTRATION.

[1] See Kinkead v. United States, 150 U. S. 483, 14 Sup. Ct. Rep. 172, 37 L. ed. 1152, 18 Ct. of Cl. 504, 24 Ct. of Cl. 459; Callsen v. Hope, 75 Fed. 758.

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1874.

TRADEMARK DECLARATION.

Signed March 28, 1874; ratification advised by the Senate June 22, 1874; ratified by the President June 26, 1874; proclaimed November 24, 1874. (Treaties and Conventions, 1889, p. 943.)

U. S. Treaties 1904, p. 670; 18 Stats. at Large, 145.

1884.

DECLARATION CONCERNING THE ADMEASUREMENT OF VESSELS.

Signed June 6, 1884.

DECLARATION.

The English method for the admeasurement of vessels (the Moorsom system) being now in force not only in the United States of America but also in the Empire of Russia and the Grand Duchy of Finland is adopted.

U. S. Treaties 1904, p. 670; 23 Stats. at Large, 789.

1887.

EXTRADITION CONVENTION.[1]

Concluded March 28, 1887; ratification advised by the Senate with amendments February 6, 1893; ratified by the President February 14, 1893; ratifications exchanged April 21, 1893; proclaimed June 5, 1893.

U. S. Treaties 1904, p. 672; 28 Stats. at Large, 1071.

[1] See Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. Rep. 195, 46 L. ed. 264; Brin v. Shine, 187 U. S. 181, 23 Sup. Ct. Rep. 98, 47 L. ed. 130; In re Grin, 112 Fed. 790.

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ARTICLES.

I. Surrender of accused; evidence.
II. Extraditable crimes.
III. Political offenses.
IV. Nondelivery of citizens.
V. Persons under trial.
VI. Procedure.
VII. Provisional detention.
VIII. Articles taken with fugitives.
IX. Persons claimed by a third country.
X. Expenses.
XI. Duration; ratification.

1894.

AGREEMENT FOR A MODUS VIVENDI IN RELATION TO THE FUR-SEAL FISHERIES IN BERING SEA AND THE NORTH PACIFIC OCEAN.

Concluded May 4, 1894; ratification advised by the Senate May 9, 1894; proclaimed May 12, 1894.

U. S. Treaties 1904, p. 675; 28 Stats. at Large, 1202.

PARAGRAPHS.

1. Sealing by United States citizens prohibited on Russian coasts.
2. Seizure of offending vessels.
3. Trials.
4. Limit of catch.
5. Retroactive force.
6. Termination at will.

SALVADOR.

(FORMERLY SAN SALVADOR.)

1850.

CONVENTION OF AMITY, NAVIGATION AND COMMERCE.

Concluded January 2, 1850; ratification advised by the Senate September 24, 1850; ratified by the President November 14, 1850; time for exchange of ratifications extended by the Senate September 27, 1850; ratifications exchanged June 2, 1852; exchange of ratifications consented to by the Senate April 4, 1853; proclaimed April 18, 1853. (Treaties and Conventions, 1889, p. 945.)

U. S. Treaties 1904, p. 677; 10 Stats. at Large, Treaties, 71.

This treaty of thirty-six articles was superseded by the Treaty of December 6, 1870.

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1870.

EXTRADITION CONVENTION.

Concluded May 23, 1870; ratification advised by the Senate December 9, 1870; ratified by the President December 16, 1870; time for exchange of ratifications extended by conventions of May 12, 1873; ratifications exchanged March 2, 1874; proclaimed March 4, 1874. (Treaties and Conventions, 1889, p. 955.)

U. S. Treaties 1904, p. 677; 18 Stats. at Large, Treaties, 9.

This convention, consisting of eight articles, was denounced on notice given by Salvador, to take effect March 2, 1904.

1870.

TREATY OF AMITY, COMMERCE, AND CONSULAR PRIVILEGES.

Concluded December 6, 1870; ratification advised by the Senate March 31, 1871; ratified by the President April 11, 1871; time for exchange of ratifications extended by convention of May 12, 1873; ratifications exchanged March 11, 1874; proclaimed March 13, 1874. (Treaties and Conventions, 1889, p. 957.)

U. S. Treaties 1904, p. 677; 18 Stats. at Large, Treaties, 41.

Upon notice from the government of Salvador this general treaty of thirty-nine articles was abrogated May 30, 1893.

1873.

EXTRADITION CONVENTION.

Concluded May 12, 1873; ratification advised by the Senate February 9, 1874; ratified by the President February 16, 1874; ratifications exchanged March 2, 1874; proclaimed March 4, 1874.

U. S. Treaties 1904, p. 678; 18 Stats. at Large, 796.

This convention extended for one year the time for the exchange of ratifications of the Extradition Convention of May 23, 1870.

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1873.

CONVENTION OF AMITY, COMMERCE, AND CONSULAR PRIVILEGES.

Concluded May 12, 1873; ratification advised by the Senate March 2, 1874; ratified by the Senate March 10, 1874; ratifications exchanged March 11, 1874; proclaimed March 13, 1874.

U. S. Treaties 1904, p. 678; 18 Stats. at Large, 114.

The time for the exchange of ratifications of the Treaty of December 6, 1870, was extended one year by this convention.

SAMOAN ISLANDS.

1878.

TREATY OF FRIENDSHIP AND COMMERCE.

Concluded January 17, 1878; ratification advised by the Senate with amendments January 30, 1878; ratified by the President February 8, 1878; ratifications exchanged February 11, 1878; proclaimed February 13, 1878. (Treaties and Conventions, 1889, p. 972.)

U. S. Treaties 1904, p. 679; 20 Stats. at Large, 704.

This treaty, consisting of eight articles, is annulled by Treaty of December 2, 1899, between United States, Germany, and Great Britain.

1889.

GENERAL ACT PROVIDING FOR THE NEUTRALITY AND AUTONOMOUS GOVERNMENT OF THE SAMOAN ISLANDS.

Concluded at Berlin June 14, 1889; ratification advised by the Senate February 4, 1890; ratified by the President February 21, 1890; ratifications exchanged April 12, 1890; assented to by Samoa April 19, 1890; proclaimed May 21, 1890.

U. S. Treaties 1904, p. 679; 26 Stats. at Large, 1497.

This general act, consisting of eight articles, was expressly annulled by Treaty of December 2, 1899, between United States, Germany, and Great Britain.

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1899.

CONVENTION BETWEEN UNITED STATES, GERMANY, AND GREAT BRITAIN RELATING TO SETTLEMENT OF SAMOAN CLAIMS.

Concluded November 7, 1899; ratification advised by Senate February 21, 1900; ratified by President March 5, 1900; ratifications exchanged March 7, 1900; proclaimed March 8, 1900.

U. S. Treaties 1904, p. 679; 31 Stats. at Large, 1875.

ARTICLES.

I. Claims considered.
II. Arbitrator.
III. Claims of persons not natives.
IV. Ratifications.

1902.

SAMOAN CLAIMS DECISION.

Decision given by His Majesty Oscar II, King of Sweden and Norway, as arbitrator under convention of November 7, 1899, between Germany, Great Britain, and the United States, relating to claims on account of military operations conducted in Samoa in 1899, given at Stockholm October 14, 1902.

U. S. Treaties 1904, p. 681.

1899.

CONVENTION TO ADJUST THE QUESTION BETWEEN THE UNITED STATES, GERMANY, AND GREAT BRITAIN IN RESPECT TO THE SAMOAN ISLANDS.

Concluded December 2, 1899; ratification advised by Senate January 16, 1900; ratified by the President February 13, 1900; ratifications exchanged February 16, 1900; proclaimed February 16, 1900.

U. S. Treaties 1904, p. 685; 31 Stats. at Large, 1878.

ARTICLES.

I. General act and treaties annulled.
II. Reciprocal renunciations.
III. Commercial privileges.
IV. Ratifications.

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SARDINIA.

1838.

TREATY OF COMMERCE AND NAVIGATION.

Concluded November 26, 1838; ratification advised by the Senate March 2, 1839; ratified by the President March 8, 1839; ratifications exchanged March 18, 1839; proclaimed March 18, 1839. (Treaties and Conventions, 1889, p. 974.)

U. S. Treaties 1904, p. 687; 8 Stats. at Large, 512.

This treaty of twenty articles and a separate article was superseded by the Treaty of 1871 with Italy as Sardinia had become merged into that kingdom.

SAXONY.

(See GERMAN EMPIRE.)

1845.

CONVENTION ABOLISHING DROIT D'AUBAINE AND EMIGRATION TAXES.

Concluded May 14, 1845; ratification advised by the Senate, with amendment, April 15, 1846; ratified by the President April 22, 1846; ratifications exchanged August 12, 1846; proclaimed September 9, 1846. (Treaties and Conventions, 1889, p. 981.)

U. S. Treaties 1904, p. 688; 9 Stats. at Large, Treaties, 40.

ARTICLES.

I. Taxes abolished.
II. Disposal of real property.
III. Disposal of personal property.
IV. Protection of rights of absent heirs.
V. Suits.
VI. Extent of treaty provisions.
VII. Ratification.

SCHAUMBURG-LIPPE.

(See GERMAN EMPIRE.)

The Principality of Schaumburg-Lippe, June 7, 1854, acceded to the Extradition Convention concluded with Prussia and other German States, June 16, 1852, and the additional article of November 16, 1852.

U. S. Treaties 1904, p. 689; 10 Stats. at Large, Treaties, 106.

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SERVIA.

1881.

CONVENTION OF COMMERCE AND NAVIGATION.

Concluded October 14, 1881; ratification advised by the Senate July 5, 1882; ratified by the President July 14, 1882; ratifications exchanged November 15, 1882; proclaimed December 27, 1882. (Treaties and Conventions, 1889, p. 984.)

U. S. Treaties 1904, p. 690; 22 Stats. at Large, 963.

ARTICLES.

I. Freedom of commerce, navigation and trade.
II. Rights of real and personal property.
III. Trade privileges.
IV. Exemptions, etc.
V. Prohibitions of imports, etc., restricted.
VI. Import and export duties.
VII. Freedom of imports.
VIII. Transit of goods.
IX. Ad valorem duties.
X. Exceptions of local traffic.
XI. Freight on railways.
XII. Trademarks.
XIII. Shipping charges.
XIV. Duration.
XV. Ratification.

1881.

CONSULAR CONVENTION.

Concluded October 14, 1881; ratification advised by the Senate July 5, 1882; ratified by the President July 14, 1882; ratifications exchanged November 15, 1882; proclaimed December 27, 1882. (Treaties and Conventions, 1889, p. 988.)

U. S. Treaties 1904, p. 694; 22 Stats. at Large, 968.

ARTICLES.

I. Consular officers.
II. Exequaturs.
III. Exemptions.
IV. Testimony by consular officers.
V. Arms and flag.
VI. Inviolability of archives and offices.
VII. Acting officers.
VIII. Vice-consuls and agents.
IX. Correspondence with authorities.
X. Notarial services.
XI. Estates of deceased persons.
XII. Surrender of certain privileges.
XIII. Duration; ratification.

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1901.

EXTRADITION TREATY.

Concluded October 25, 1901; ratification advised by Senate January 27, 1902; ratified by President March 7, 1902; ratifications exchanged May 13, 1902; proclaimed May 17, 1902.

U. S. Treaties 1904, p. 698; 32 Stats. at Large, 1890.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Procedure.
IV. Provisional detention.
V. Nondelivery of citizens.
VI. Political offenses.
VII. Limitations.
VIII. Prior offenses.
IX. Property seized with fugitive.
X. Persons claimed by other countries.
XI. Expenses; duration; ratification.

SIAM.

1833.

CONVENTION OF AMITY AND COMMERCE.

Concluded March 20, 1833; ratification advised by the Senate June 30, 1834; ratified by the President; ratifications exchanged April 14, 1836; proclaimed June 24, 1837. (Treaties and Conventions, 1889, p. 992.)

U. S. Treaties 1904, p. 703; 8 Stats. at Large, 454.

(The provisions of this treaty were modified by the Treaty of 1856.)

ARTICLES.

I. Peace.
II. Freedom of trade, etc.
III. Shipping duties in Siam.
IV. Most favored nation duties.
V. Shipwrecks.
VI. Settlement of debts.
VII. Trading in Siam.
VIII. Capture by pirates.
IX. Laws of Siam.
X. Consuls in Siam.

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1856.

TREATY OF AMITY AND COMMERCE.

Concluded May 29, 1856; ratification advised by the Senate with amendment March 13, 1857; ratified by the President March 16, 1857; ratifications exchanged June 15, 1857; time for exchange of ratifications extended by the Senate June 15, 1858: proclaimed August 16, 1858. (Treaties and Conventions, 1889. p. 995.)

U. S. Treaties 1904, p. 706; 11 Stats. at Large, 683.

ARTICLES.

I. Amity; mutual assistance.
II. Consul at Bangkok; powers.
III. Offenses in Siam.
IV. Trade privileges in Siam.
V. Americans in Siam.
VI. Religious freedom, etc.
VII. Privileges to ships of war in Siam.
VIII. Duties; trade, etc.
IX. Treaty regulations.
X. Most favored nation privileges.
XI. Duration; revision.
XII. Ratification.

1867.

MODIFICATION TO TREATY OF AMITY AND COMMERCE OF MAY 29, 1856.

Concluded December 17-31, 1867; ratification advised by Senate July 25, 1868; ratified by the President August 11, 1868.

U. S. Treaties 1904, p. 713; 17 Stats. at Large, 807.

1884.

AGREEMENT REGULATING LIQUOR TRAFFIC IN SIAM.

Concluded May 14, 1884; ratification advised by the Senate June 28, 1884; ratified by the President June 30, 1884; ratifications exchanged June 30, 1884; proclaimed July 5, 1884.

U. S. Treaties 1904, p. 714; 23 Stats. at Large, 782.

ARTICLES.

I. Duties on liquors.
II. Testing of spirits.
III. Deleterious spirits.
IV. Licenses to sell.
V. Most favored nation privileges.
VI. Duration.
VII. Ratification, etc.

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SPAIN.

1795.[1]

TREATY OF FRIENDSHIP, BOUNDARIES, COMMERCE AND NAVIGATION.

Concluded October 27, 1795; ratification advised by the Senate March 3, 1796; ratified by the President; ratifications exchanged April 25, 1796; proclaimed August 2, 1796. (Treaties and Conventions, 1889, p. 1006.)

U. S. Treaties 1904, p. 717; 8 Stats. at Large, 138.

This treaty consisted of twenty-three articles. It contained an agreement as to the southern and western boundaries of the United States; the mutual free navigation of the Mississippi River from its source to the ocean; the usual articles relating to commerce and navigation; the authority to appoint consuls; the appointment of a claims commission to settle claims of United States citizens against Spain, etc. The claims commission provided for met in Philadelphia, terminating their duties December 31, 1799, having made awards to the amount of $325,440.07½ on account of Spanish spoliations.

1802.

CLAIMS CONVENTION.

Concluded August 11, 1802; ratification advised by the Senate January 9, 1804; ratified by the President January 9, 1804; ratifications exchanged December 21, 1818; proclaimed December 22, 1818. (Treaties and Conventions, 1889, p. 1015.)

U. S. Treaties 1904, p. 717; 8 Stats. at Large, 198.

[1] See The Nereide, 9 Cranch, 388, 3 L. ed. 769; The Pezarro, 2 Wheat. 227, 4 L. ed. 226; The Nuestra Señora de la Caridad, 4 Wheat. 497, 4 L. ed. 624; The Amiable Isabella, 6 Wheat. 1, 5 L. ed. 191; The Bello Corrunes, 6 Wheat. 152, 5 L. ed. 229; The Santissima Trinidad, 7 Wheat. 283, 5 L. ed. 454; Henderson v. Poindexter's Lessee, 12 Wheat. 530, 6 L. ed. 718; United States v. The Amistead, 15 Pet. 518, 10 L. ed. 826; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Robinson v. Minor, 10 How. 627, 13 L. ed. 568; Le Tiqre, 3 Wash. C. C. 567, Fed Cas. No. 8281; The Santissima Trinidad, 1 Brock, 478, Fed. Cas. No. 2568.

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This convention provided for the appointment of a board of five commissioners to adjust the claims for "indemnification of those who have sustained losses, damages, or injuries in consequence of the excesses of individuals of either nation during the late war contrary to the existing treaty or the laws of nations." As the convention was not proclaimed until the 22d of December, 1818, and was annulled by Article X of the Treaty of 1819, it never went into effect.

1819.[1]

TREATY OF FRIENDSHIP, CESSION OF THE FLORIDAS, AND BOUNDARIES.

Concluded February 22, 1819; ratification advised by the Senate February 24, 1819; ratification advised again by the Senate February 19, 1821; ratified by the President February 22, 1821; ratifications exchanged February 22, 1821; proclaimed February 22, 1821. (Treaties and Conventions, 1889, p. 1016.)

U. S. Treaties 1904, p. 718; 8 Stats. at Large, 252.

[1] See Comegys v. Vasse, 1 Pet. 193, 7 L. ed. 108, 4 Wash. C. C. 570, Fed. Cas. No. 16,894; American Ins. Co. v. 365 Bales of Cotton, 1 Pet. 511, 7 L. ed. 243; Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; United States v. Percheman, 7 Pet. 51, 8 L. ed. 604; United States v. Clarke, 8 Pet. 436, 8 L. ed. 1001, 9 Pet. 168, 9 L. ed. 89, 16 Pet. 228, 10 L. ed. 946; Mitchel v. United States, 9 Pet. 711, 9 L. ed. 283; United States v. Sibbald, 10 Pet. 313, 9 L. ed. 437; Smith v. United States, 10 Pet. 326, 9 L. ed. 442; United States v. Mill's Heirs, 12 Pet. 215, 9 L. ed. 1061; United States v. Kingsley, 12 Pet. 476, 9 L. ed. 1163; Garcia v. Lee, 12 Pet. 511, 9 L. ed. 1176; United States v. Wiggins, 14 Pet. 334, 10 L. ed. 481; Pollard v. Kibbe, 14 Pet. 353, 10 L. ed. 490; O'Hara v. United States, 15 Pet. 275, 10 L. ed. 737; United States v. Delespine, 15 Pet. 319, 10 L. ed. 753; United States v. The Amistead, 15 Pet. 518, 10 L. ed. 826; United States v. Breward, 16 Pet. 143, 10 L. ed. 916; United States v. Miranda, 16 Pet. 153, 10 L. ed. 920; United States v. Hanson, 16 Pet. 196, 10 L. ed. 935; United States v. Acosta, 1 How. 24, 11 L. ed. 33; Pollard v. Files, 2 How. 591, 11 L. ed. 391; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Doe v. Braden, 16 How. 635, 14 L. ed. 1090; Meade v. United States, 9 Wall. 691, 19 L. ed. 687, 2 Ct. of Cl. 224; United States v. Lynde's Heirs, 11 Wall. 632, 20 L. ed. 230; United States v. Texas, 162 U. S. 1, 16 Sup. Ct. Rep. 725, 40 L. ed. 867; Gray v. United States, 21 Ct. of Cl. 340.

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1834.

CLAIMS CONVENTION.

Concluded February 17, 1834; ratification advised by the Senate May 13, 1834; ratified by the President; ratifications exchanged August 14, 1834; proclaimed November 1, 1834. (Treaties and Conventions, 1889, p. 1023.)

U. S. Treaties 1904, p. 719; 8 Stats. at Large, 460.

ARTICLES.

I. Indemnification to United States.
II. Interest.
III. Claims renounced.
IV. List of claims.
V. Ratification.

1871.

CLAIMS AGREEMENT.

Signed February 12, 1871. (U. S. Treaties and Conventions, 1889, p. 1025.)

17 Stats. at Large, 839.

This agreement provided for the creation of a mixed commission to determine the claims of American citizens against Spain for injuries inflicted in the "Ten Years War" in Cuba.

1877.

EXTRADITION CONVENTION.

Concluded January 5, 1877; ratification advised by the Senate February 9, 1877; ratified by the President February 14, 1877; ratifications exchanged February 21, 1877; proclaimed February 21, 1877. (Treaties and Conventions, 1889, p. 1027.)

U. S. Treaties 1904, p. 721; 19 Stats. at Large, Treaties, 94.

This convention of twelve articles contained the usual provisions for the extradition of fugitives from justice.

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1882.

TRADEMARK CONVENTION.

Concluded June 19, 1882; ratification advised by the Senate July 5, 1882; ratified by the President April 4, 1883; ratifications exchanged April 19, 1883; proclaimed April 19, 1883. (Treaties and Conventions, 1889, p. 1036.)

U. S. Treaties 1904, p. 722; 22 Stats. at Large, 979.

This convention of three articles contained the usual reciprocal agreements for the protection of trademarks and manufactured articles.

1882.

SUPPLEMENTARY EXTRADITION CONVENTION.[1]

Concluded August 7, 1882; ratification advised by the Senate February 27, 1883; ratified by the President April 4, 1883; ratifications exchanged April 19, 1883; proclaimed April 19, 1883. (Treaties and Conventions, 1889, p. 1037.)

U. S. Treaties 1904, p. 722; 22 Stats. at Large, 991.

By the articles of this supplementary convention to the Extradition Convention of 1877, additions were made to the list of extraditable offenses, and an agreement made for the temporary detention of criminals and the co-operation of both governments to secure the arrest and delivery of the criminals demanded.

1898.

TREATY OF PEACE.[2]

Concluded at Paris December 10, 1898; ratification advised by the Senate February 6, 1899; ratified by the President February 6, 1899; ratifications exchanged April 11, 1899; proclaimed April 11, 1899.

U. S. Treaties 1904, p. 722; 30 Stats. at Large, 1754.

[1] See Oteiza y Cortes v. Jacobus, 136 U. S. 330, 10 Sup. Ct. Rep. 1034, 34 L. ed. 464; Castro v. De Uriarte, 12 Fed. 250, 16 Fed. 93; In re Cortes, 42 Fed. 47; Ex parte Oritz, 100 Fed. 955.

[2] See Dooley v. United States, 182 U. S. 222, 21 Sup. Ct. Rep. 762, 45

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ARTICLES.

I. Relinquishment of Cuba.
II. Cession of Porto Rico, Guam, etc.
III. Cession of Philippine Islands.
IV. Spanish trade with the Philippines.
V. Return of Spanish soldiers from Manila; evacuation of Philippines and Guam.
VI. Release of prisoners.
VII. Relinquishment of claims.
VIII. Property relinquished and ceded.
IX. Property and civil rights of persons in ceded territory.
X. Religious freedom.
XI. Legal rights in ceded or relinquished territory.
XII. Determination of pending judicial proceedings.
XIII. Privileges of copyrights and patents preserved in ceded territories.
XIV. Consular privileges.
XV. Mutual privileges of shipping charges.
XVI. Obligations of Cuba.
XVII. Ratification.

1900.

PROTOCOL WITH SPAIN EXTENDING THE PERIOD DURING WHICH SPANISH SUBJECTS, NATIVES OF THE PHILIPPINE ISLANDS, MAY DECLARE THEIR INTENTION TO RETAIN THEIR SPANISH NATIONALITY.

Concluded March 29, 1900; advice and consent of the Senate April 27, 1900; proclaimed April 28, 1900.

U. S. Treaties 1904, p. 727; 31 Stats. at Large, 1881.

ARTICLE.

Extension.

L. ed. 1074, 183 U. S. 151, 22 Sup. Ct. Rep. 62, 46 L. ed. 128; Pepke v. United States, 183 U. S. 176, 22 Sup. Ct. Rep. 59, 46 L. ed. 138; De Léma v. Bidwell, 182 U. S. 1, 21 Sup. Ct. Rep. 743, 45 L. ed. 1041; Goetze v. United States, 182 U. S. 221, 21 Sup. Ct. Rep. 742, 45 L. ed. 1065, 103 Fed. 72; Armstrong v. United States, 182 U. S. 243, 21 Sup. Ct. Rep. 827, 45 L. ed. 1086; Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. Rep. 770, 45 L. ed. 1088; Huus v. New York and Porto Rico S. S. Co., 182 U. S. 392, 21 Sup. Ct. Rep. 827, 45 L. ed. 1146; Crossman v. United States, 182 U. S. 221, 21 Sup. Ct. Rep. 742, 45 L. ed. 1065; Armstrong v. Bidwell, 124 Fed. 690; De Pass v. Bidwell, 124 Fed. 615; American Sugar R. Co. v. Bidwell, 124 Fed. 677; Howell v. Bidwell, 124 Fed. 688.

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1900.

TREATY FOR CESSION OF OUTLYING ISLANDS OF THE PHILIPPINES.

Concluded November 7, 1900; ratification advised by Senate January 22, 1901; ratified by the President January 30, 1901; ratifications exchanged March 23, 1901; proclaimed March 23, 1901.

U. S. Treaties 1904, p. 728; 31 Stats. at Large, 1942.

ARTICLE.

Relinquishment of islands to the United States.

1901.

AGREEMENT WITH SPAIN EXEMPTING FROM AUTHENTICATION SIGNATURES ATTACHED TO LETTERS ROGATORY EXCHANGED WITH PORTO RICO, THE PHILIPPINE ISLANDS, AND SPAIN.

Concluded August 7, 1901; effective November 28, 1901.

U. S. Treaties 1904, p. 729.

1902.

TREATY OF FRIENDSHIP AND GENERAL RELATIONS.

Concluded at Madrid July 3, 1902; ratification advised by the Senate December 16, 1902; ratified by the President February 6, 1903; ratifications exchanged April 14, 1903; proclaimed April 20, 1903.

U. S. Treaties 1904, p. 732; 33 Stats. at Large, pt. 2, p. 2105.

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ARTICLES.

I. Amity.
II. Commerce; navigation; favored nation treatment.
III. Disposition of real and personal property.
IV. Religious liberty.
V. Exemptions of citizens and vessels.
VI. Access to courts; favored nation treatment.
VII. Customs duties.
VIII. Mutual privileges of shipping.
IX. Coasting trade.
X. Shipwrecks.
XI. Nationality of vessels.
XII. Diplomatic privileges.
XIII. Consular officers.
XIV. Consular privileges.
XV. Consular exemptions.
XVI. Testimony by consuls.
XVII. Arms and flags at consulates.
XVIII. Consular offices and archives.
XIX. Acting consular officers.
XX. Vice-consuls and agents.
XXI. Application to authorities by consuls.
XXII. Notarial powers.
XXIII. Shipping disputes.
XXIV. Deserters from ships.
XXV. Damages to vessels at sea.
XXVI. Notice of decease of citizens.
XXVII. Representation of minor heirs, etc.
XXVIII. Favored nation treatment of consuls.
XXIX. Annulling of prior treaties.
XXX. Duration.
XXXI. Ratification.

1902.

AGREEMENT BY INTERCHANGE OF NOTES WITH SPAIN AS TO RESTORATION OF INTERNATIONAL COPYRIGHT AGREEMENT.

Concluded November 26, 1902.

U. S. Treaties 1904, p. 741. The proclamation in reference to copyrights is dated July 10, 1895, 29 Stats. at Large, 871.

SWEDEN AND NORWAY.

(See NORWAY.)

SWEDEN.

1783.

TREATY OF AMITY AND COMMERCE.

Concluded April 3, 1783; ratified by the Continental Congress July 29, 1783; proclaimed by Congress September 25, 1783. (Treaties and Conventions, 1889, p. 1042.)

U. S. Treaties 1904, p. 744; 8 Stats. at Large, 60.

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(This treaty terminated by its own limitations in 1796; certain articles were revived by the Treaty of 1816, and by Article XVII of the Treaty of 1827.

ARTICLES.

I. (Peace and friendship.)
II. Most favored nation privileges.
III. (Privileges to Swedish subjects in United States.)
IV. (Privileges to United States citizens in Sweden.)
V. Religious freedom.
VI. Effects of deceased persons.
VII. Commerce in case of war.
VIII. Extent of freedom of commerce.
IX. Contraband goods.
X. Goods not contraband.
XI. Ships' papers in case of war.
XII. Navigation in time of war.
XIII. Detention of contraband goods, etc.
XIV. Goods on enemy's ships.
XV. Instructions to naval vessels.
XVI. Bond from privateers.
XVII. Recaptured ships; embargoes.
XVIII. Regulations for war with common enemy.
XIX. Prizes.
XX. (Shipwrecks.)
XXI. Asylum for ships in distress.
XXII. Property rights in case of war.
XXIII. Letters of marque.
XXIV. (Shipping privileges.)
XXV. Visit of war vessels.
XXVI. (Consuls.)
XXVII. Ratification.
Separate article. Duration.

SEPARATE ARTICLES.

I. Defense of ships in Sweden.
II. Defense of ships in United States.
III. (Mutual protection of merchant vessels.)
IV. Right to trade.
V. Freedom of vessels from search.

1816.

TREATY OF AMITY AND COMMERCE.

Concluded September 4, 1816; ratification advised by the Senate with amendments February 19, 1817; ratified by the President May 27, 1818; ratifications exchanged September 25, 1818: proclaimed December 31, 1818. (Treaties and Conventions, 1889, p. 1053.)

U. S. Treaties 1904, p. 753; 8 Stats. at Large, 232.

This treaty of fourteen articles expired by its own limitations September 25, 1826, and was replaced by the Treaty of 1827.

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1827.

TREATY OF COMMERCE AND NAVIGATION.

Concluded July 4, 1827; ratification advised by the Senate January 7, 1828; ratified by the President; ratifications exchanged January 18, 1828; proclaimed January 19, 1828. (Treaties and Conventions, 1889, p. 1058.)

U. S. Treaties 1904, p. 754; 8 Stats. at Large, 346.

ARTICLES.

I. Freedom of commerce and trade.
II. Shipping dues.
III. No discrimination on imports.
IV. No discrimination on exports.
V. Trade with St. Bartholomew.
VI. Coastwise trade.
VII. No discrimination in purchases.
VIII. Tonnage, etc., dues.
IX. No restriction on imports.
X. Transit privileges, bounties, etc.
XI. Shipping privileges.
XII. Discnarge of cargoes.
XIII. Consular officers and powers.
XIV. Deserters from ships.
XV. Shipwrecks.
XVI. Quarantine.
XVII. Articles of former treaty revived.
XVIII. Blockade rules.
XIX. Duration.
XX. Ratification.
Separate article. Trade with Finland.

1860.

EXTRADITION CONVENTION.

Concluded March 21, 1860; ratification advised by the Senate June 26, 1860; ratified by the President December 14, 1860; ratifications exchanged December 20, 1860; proclaimed December 21, 1860. (Treaties and Conventions, 1889, p. 1066.)

U. S. Treaties 1904, p. 761; 12 Stats. at Large, 1125.

This treaty of seven articles was concluded between the United States and Sweden and Norway. It was superseded as to Norway December 8, 1893, by the Treaty of June 7, 1893, and as to Sweden April 17, 1893, by the Treaty of January 14, 1893.

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1869.

NATURALIZATION CONVENTION.

Concluded May 26, 1869; ratification advised by the Senate with amendment December 9, 1870; ratified by the President December 17, 1870; ratifications exchanged June 14, 1871; exchange of ratifications consented to by the Senate January 8, 1872; proclaimed January 12, 1872. (Treaties and Conventions, 1889, p. 1068.)

U. S. Treaties 1904, p. 761; 17 Stats. at Large, 809.

ARTICLES.

I. Recognition of naturalization.
II. Liability for prior offenses.
III. Restoration to former citizenship.
IV. Extradition convention continued.
V. Duration.
VI. Ratification.

1893.

EXTRADITION TREATY.

Concluded January 14, 1893; ratification advised by the Senate February 2, 1893; ratified by the President February 8, 1893; ratifications exchanged March 18, 1893; proclaimed March 18, 1893.

U. S. Treaties 1904, p. 764; 27 Stats. at Large, 972.

ARTICLES.

I. Surrender of accused.
II. Extraditable crimes.
III. Procedure.
IV. Provisional detention.
V. Nondelivery of citizens.
VI. Political offenses.
VII. Limitation.
VIII. Restrictions on trials.
IX. Property seized with fugitive.
X. Persons claimed by other countries.
XI. Expenses.
XII. Effect; ratification.

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SWITZERLAND.[1]

(SWISS CONFEDERATION.)

1847.

CONVENTION AS TO PROPERTY RIGHTS.

Concluded May 18, 1847; ratification advised by the Senate April 26, 1848; ratified by the President April 29, 1848; ratifications exchanged May 3, 1848; proclaimed May 4, 1848. (Treaties and Conventions, 1889, p. 1071.)

U. S. Treaties 1904, p. 768; 9 Stats. at Large, Treaties, 100.

This convention of three articles is superseded by the Convention of 1850.

1850.

CONVENTION OF FRIENDSHIP, COMMERCE, AND EXTRADITION.

Concluded November 25, 1850; ratification advised by the Senate with amendments March 7, 1851; ratified by the President March 12, 1851; ratification again advised by the Senate with amendment May 29, 1854; finally ratified by the President November 6, 1854; ratifications exchanged November 8, 1855; proclaimed November 9, 1855. (Treaties and Conventions, 1889, p. 1072.)

U. S. Treaties 1904, p. 768; 11 Stats. at Large, 587.

Note.—Notice was given on March 23, 1899, of the intention of the United States to arrest the operation of Articles VIII to XII, inclusive.

Articles XIII, XIV, XV, XVI, and XVII were terminated by the treaty concluded May 14, 1900.

[1] See Weiberg v. The St. Oloff, 2 Pet. Adm. 428, Fed. Cas. No. 17,357.

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ARTICLES.

I. Personal and property privileges.
II. Civil duties and immunities.
III. Return of citizens.
IV. Passports.
V. Real and personal property rights.
VI. Civil suits.
VII. Consular officers and privileges.
VIII. Most favored nation commercial privileges. (Not in force.)
IX. Export and import duties. (Not in force.)
X. Future commercial privileges. (Not in force.)
XI. Differential duties. (Not in force.)
XII. Shipping; shipwrecks. (Not in force.)
(Articles XIII, XIV, XV, XVI, and XVII relate to extradition, and were terminated by Extradition Treaty of 1900.)
XVIII. Duration.
XIX. Ratification.

1883.

REGISTRATION OF TRADEMARKS.

Dated April 27, 1883, and May 14, 1883.

U. S. Treaties 1904, p. 772.

1900.

EXTRADITION TREATY.

Concluded May 14, 1900; ratified by Senate June 5, 1900; ratified by President February 25, 1901; ratified by Switzerland January 21, 1901; ratifications exchanged February 27, 1901; proclaimed February 28, 1901.

U. S. Treaties 1904, p. 774; 31 Stats. at Large, 1928.

ARTICLES.

I. Delivery of accused.
II. Extraditable crimes.
III. Attempts to commit extraditable crimes.
IV. Special court.
V. Procedure.
VI. Provisional detention.
VII. Political offenses.
VIII. Limitations.
IX. Prior offenses; surrender to third state.
X. Extradition deferred.
XI. Persons demanded by third state.
XII. Property seized with fugitive.
XIII. Expenses.
XIV. Annulling prior treaty; duration; ratification.

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TEXAS.

The admission of Texas into the United States December 29, 1845, rendered the treaties concluded in 1838 obsolete.

1838.

CLAIMS CONVENTION.

Concluded April 11, 1838; ratification advised by the Senate June 13, 1838; ratified by the President June 21, 1838; ratifications exchanged July 6, 1838; proclaimed July 6, 1838. (Treaties and Conventions, 1889, p. 1078.)

U. S. Treaties 1904, p. 779; 8 Stats. at Large, 510.

By this treaty Texas agreed to pay $11,750 in settlement of claims of citizens of the United States for the capture of the brigs "Pocket" and "Durango," and other injuries.

1838.

BOUNDARY CONVENTION.

Concluded April 25, 1838; ratification advised by the Senate May 10, 1838; ratified by the President October 4, 1838; ratifications exchanged October 12, 1838; proclaimed October 13, 1838. (Treaties and Conventions, 1889, p. 1079.)

U. S. Treaties 1904, p. 779; 8 Stats. at Large, 511.

This treaty provided for a commission to survey and mark the boundary between the United States and Texas.

TONGA.

1886.

TREATY OF AMITY, COMMERCE, AND NAVIGATION.

Concluded October 2, 1886; ratification advised by the Senate, with amendment, January 19, 1888; ratified by the President February 7, 1888; ratifications exchanged August 1, 1888; proclaimed September 18, 1888. (Treaties and Conventions, 1889, p. 1205.)

U. S. Treaties 1904, p. 780; 25 Stats. at Large, 1440.

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ARTICLES.

I. Amity.
II. Most favored nation privileges.
III. Trade privileges.
IV. Commerce and navigation imports.
V. Shipping charges.
VI. Coaling station in Tonga.
VII. Privileges to steam mail ships.
VIII. Whaling and fishing ships.
IX. Personal exemptions.
X. Deserters from ships.
XI. Consular officers.
XII. Consular jurisdiction.
XIII. Religious freedom.
XIV. Duration.
XV. Ratification.

TRIPOLI.

1796.

TREATY OF PEACE AND FRIENDSHIP.

Concluded November 4, 1796; ratification advised by the Senate June 7, 1797; ratified by the President June 10, 1797; proclaimed June 10, 1797. (Treaties and Conventions, 1889, p. 1081.)

U. S. Treaties 1904, p. 784; 8 Stats. at Large, 154.

This treaty of twelve articles was superseded by the Treaty of 1805.

1805.

TREATY OF PEACE AND AMITY.

Concluded June 4, 1805; ratification advised by the Senate April 12, 1806; ratified by the President (?); ratifications exchanged (?); proclaimed (?). (Treaties and Conventions, 1889, p. 1084.)

U. S. Treaties 1904, p. 784; 8 Stats. at Large, 214.

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ARTICLES.

I. Peace, friendship and commerce.
II. Exchange of prisoners.
III. Withdrawal of United States forces.
IV. Neutral rights.
V. Liberation of captive citizens.
VI. Ships' passports.
VII. Purchase of prizes.
VIII. Asylum for supplies.
IX. Shipwrecks.
X. Assistance to vessels in territorial waters.
XI. Most favored nation commercial privileges.
XII. Consular responsibility in Tripoli.
XIII. Salutes to naval vessels.
XIV. Religious freedom, etc.
XV. Settlement of disputes.
XVI. Treatment of prisoners.
XVII. Captured vessels.
XVIII. Judicial power of consul.
XIX. Homicides, etc.
XX. Estates of deceased persons; ratification.

TUNIS.

[Treaties with Tunis were superseded by treaty between United States and France of May 9, 1904.]

1797.

TREATY OF AMITY, COMMERCE, AND NAVIGATION.

Concluded August, 1797; ratification advised by the Senate, with amendments, March 6, 1798; alterations concluded March 26, 1799; ratification again advised by the Senate December 24, 1799. (Treaties and Conventions, 1889, p. 1090.)

U. S. Treaties 1904, p. 790; 8 Stats. at Large, 157.

ARTICLES.

I. Amity.
II. Restoration of property captured.
III. Rights of vessels.
IV. Ships' passports.
V. Ships under convoy.
VI. Search of ships.
VII. Vessels purchased.
VIII. Asylum for supplies and shelter.
IX. Shipwrecks.
X. Protection of ships in territorial waters.
XI. Salutes to naval vessels.
XII. Trading rights and privileges.
XIII. Enemies' subjects serving as sailors.
XIV. Import duties.
XV. Freedom of commerce; prohibitions.
XVI. Anchorage charges.
XVII. Consuls.
XVIII. Responsibility for debts.
XIX. Effects of deceased persons.
XX. Jurisdiction of consuls.
XXI. Homicides, etc.
XXII. Civil suits.
XXIII. Settlement of disputes.

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1824.[1]

CONVENTION AMENDING TREATY OF AUGUST, 1797.

Concluded February 24, 1824; ratification advised by the Senate January 13, 1825; ratified by the President January 21, 1825; proclaimed January 21, 1825. (Treaties and Conventions, 1889, p. 1096.)

U. S. Treaties 1904, p. 795; 8 Stats. at Large, 298.

(This treaty is reprinted in the treaty volume from the proclamation of President Monroe.)

ARTICLES.

VI. Search of ships; freedom of slaves.
XI. Salutes to naval vessels.
XII. Trading rights and privileges.
XIV. Most favored nation commercial privileges.

TWO SICILIES.

(See ITALY.)

1832.

CLAIMS CONVENTION.

Concluded October 14, 1832; ratification advised by the Senate January 19, 1833; ratified by the President; ratifications exchanged June 8, 1833; proclaimed August 27, 1833. (Treaties and Conventions, 1889, p. 1100.)

U. S. Treaties 1904, p. 799; 8 Stats. at Large, 442.

This convention of three articles provided for the payment of 2,115,000 Neapolitan ducats for the seizure, etc., of United States vessels by Murat in 1809, 1810, 1811, and 1812. The commission of three to decide on the distribution of the indemnity met in Washington September, 1833, and adjourned March 17, 1835. The awards of the commission amounted to $1,925,034.68.

[1] This treaty was superseded between United States and France (for Bey of Tunis), proclaimed May 9, 1904.

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1845.

TREATY OF COMMERCE AND NAVIGATION.

Concluded December 1, 1845; ratification advised by the Senate April 11, 1846; ratified by the President April 14, 1846; ratifications exchanged June 1, 1846; proclaimed July 24, 1846. (Treaties and Conventions, 1889, p. 1102.)

U. S. Treaties 1904, p. 799; 9 Stats. at Large, 13.

This treaty of thirteen articles was superseded by the convention of October 1, 1855.

1855.

CONVENTION AS TO RIGHTS OF NEUTRALS AT SEA.

Concluded January 13, 1855; ratification advised by the Senate March 3, 1855; ratified by the President March 20, 1855; ratifications exchanged July 14, 1855; proclaimed July 16, 1855. (Treaties and Conventions, 1889, p. 1107.)

U. S. Treaties 1904, p. 799; 11 Stats. at Large, 607.

This convention of three articles was superseded by the Treaty of 1871 with Italy.

1855.

CONVENTION OF AMITY, COMMERCE AND NAVIGATION, AND EXTRADITION.

Concluded October 1, 1855; ratification advised by the Senate with amendments August 13, 1856; ratified by the President August 20, 1856; ratifications exchanged November 7, 1856; proclaimed December 10, 1856. (Treaties and Conventions, 1889, p. 1109.)

U. S. Treaties 1904, p. 800; 11 Stats. at Large, 639.

This convention became obsolete by the consolidation of the Two Sicilies with the Kingdom of Italy, 1861. See Treaty of March 23, 1868, and Treaty of February 26, 1871.

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VENEZUELA.

1836.

TREATY OF PEACE, AMITY, COMMERCE AND NAVIGATION.

Concluded January 20, 1836; ratification advised by the Senate March 23, 1836; ratified by the President April 20, 1836; ratifications exchanged May 31, 1836; proclaimed June 30, 1836. (Treaties and Conventions, 1889, p. 1119.)

U. S. Treaties 1904, p. 801; 8 Stats. at Large, 466.

Pursuant to a notice from the Government of Venezuela, this convention of thirty-four articles terminated January 3, 1851.

1859.

CLAIMS CONVENTION.

Concluded January 14, 1859; ratification advised by the Senate February 21, 1861; ratified by the President February 26, 1861. (Treaties and Conventions, 1889, p. 1129.)

U. S. Treaties 1904, p. 801; 17 Stats. at Large, 803.

By this convention the claims of United States citizens against Venezuela, amounting to $130,000, for damages for being evicted from Aves Island were acknowledged and payment provided for.

1860.

TREATY OF AMITY, COMMERCE AND NAVIGATION, AND EXTRADITION.

Concluded August 27, 1860; ratification advised by the Senate February 12, 1861; ratified by the President February 25, 1861; ratifications exchanged August 9, 1861; proclaimed September 25, 1861. (Treaties and Conventions, 1889, p. 1130.)

U. S. Treaties 1904, p. 801; 12 Stats. at Large, 1143.

This treaty of thirty-two articles terminated October 22, 1870, pursuant to notice from Venezuela.

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1866.

CLAIMS CONVENTION.

Concluded April 25, 1866; ratification advised by the Senate July 5, 1866; ratified by the President August 8, 1866; ratifications exchanged April 17, 1867; proclaimed May 29, 1867. (Treaties and Conventions, 1889, p. 1140.)

U. S. Treaties 1904, p. 801; 16 Stats. at Large, 713.

The claims of citizens of the United States against Venezuela were submitted by this convention to two commissioners and an umpire, who met at Caracas, Venezuela, August 30, 1867, and adjourned August 3, 1868, awarding $1,253,310.30 against Venezuela.

1885.

CLAIMS CONVENTION.

Concluded December 5, 1885; ratification advised by the Senate with amendments April 15, 1886; ratified by the President August 7, 1888; ratifications exchanged June 3, 1889; proclaimed June 4, 1889.

U. S. Treaties 1904, p. 802; 28 Stats. at Large, 1053.

1888.

CONVENTION TO REMOVE DOUBTS AS TO THE MEANING OF THE CONVENTION OF 1885.

Concluded March 15, 1888; ratification advised by the Senate June 18, 1888; ratified by the President August 7, 1888; ratifications exchanged June 3, 1889; proclaimed June 4, 1889.

U. S. Treaties 1904, p. 802; 28 Stats. at Large, 1064.

1888.

CONVENTION EXTENDING THE TIME FOR RATIFICATION OF THE CONVENTION OF 1885.

Concluded October 5, 1888; ratification advised by the Senate December 5, 1888; ratified by the President January 30, 1889; ratifications exchanged June 3, 1889; proclaimed June 4, 1889

U. S. Treaties 1904, p. 802; 28 Stats. at Large, 1067.

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The commission authorized by the three above conventions to reopen and decide the awards under the Treaty of 1866 was organized in Washington, D. C., September 3, 1889, and adjourned September 2, 1890, awarding claims against Venezuela amounting to $980,572.60.

1892.

CLAIMS CONVENTION.

Concluded January 19, 1892; ratification advised by the Senate March 17, 1892; ratified by the President July 2, 1894; ratifications exchanged July 28, 1894; proclaimed July 30, 1894.

U. S. Treaties 1904, p. 803; 28 Stats. at Large, 1183.

By this convention the claim of the Venezuelan Steam Transportation Company against Venezuela was referred to the arbitration of two commissioners and an umpire who rendered an award of $141,800.

1903.

PROTOCOL WITH VENEZUELA SUBMITTING TO ARBITRATION CLAIMS AGAINST VENEZUELA.

Concluded February 17, 1903.

U. S. Treaties 1904, p. 803.

ARTICLES.

I. Commission; decision.
II. Basis of decision.
III. Record.
IV. Compensation.
V. Source of payment.
VI. Prompt payment.

WÜRTTEMBERG.

(See GERMAN EMPIRE.)

1844.

CONVENTION ABOLISHING DROIT D'AUBAINE AND TAXES ON EMIGRATION.

Concluded April 10, 1844; ratification advised by the Senate June 12, 1844; ratified by the President June 22, 1844; ratifications exchanged October 3, 1844; proclaimed December 16, 1844. (Treaties and Conventions, 1889, p. 1144.)

U. S. Treaties 1904, p. 806; 8 Stats. at Large, 588.

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ARTICLES.

I. Taxes abolished.
II. Disposal of real property.
III. Disposal of personal property.
IV. Property of absent heirs.
V. Civil suits.
VI. Extent of convention.
VII. Ratification.

1853.

EXTRADITION.

The King of Württemberg, October 13, 1853, acceded to the extradition Treaty of 1852 with Prussia and the states of the Germanic Confederation.

U. S. Treaties 1904, p. 807; 10 Stats. at Large, 105.

1868.

CONVENTION AS TO NATURALIZATION AND EXTRADITION.

Concluded July 27, 1868; ratification advised by the Senate April 12, 1869; ratified by the President April 18, 1869; ratifications exchanged August 17, 1869; exchange of ratifications consented to by the Senate March 2, 1870; proclaimed March 7, 1870. (Treaties and Conventions, 1889, p. 1146.)

U. S. Treaties 1904, p. 808; 16 Stats. at Large, 735.

ARTICLES.

I. Naturalization recognized.
II. Liability for prior offenses.
III. Extradition treaty renewed.
IV. Renunciation of naturalization.
V. Duration.
VI. Ratification.

ZANZIBAR.

(See MUSCAT.)

1886.

TREATY AS TO DUTIES ON LIQUORS AND CONSULAR POWERS.

Concluded July 3, 1886; ratification advised by the Senate, with amendments, April 12, 1888; ratified by the President April 20, 1888; ratifications exchanged June 29, 1888; proclaimed August 17, 1888. (Treaties and Conventions, 1889, p. 1209.)

U. S. Treaties 1904, p. 811; 25 Stats. at Large, 1438.

ARTICLES.

I. Duty on liquors.
II. Consular powers.
III. Ratification.

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APPENDIX III.

INTERNATIONAL CONVENTIONS AND ACTS TO WHICH THE UNITED STATES IS A PARTY.

1864.

AMELIORATION OF THE CONDITION OF THE WOUNDED IN TIME OF WAR.

Concluded at Geneva, Switzerland, August 22, 164; ratifications exchanged by original signatories June 22, 1865; adhesion declared by the President March 1, 1882; accession advised by the Senate March 16, 1882; adhesion accepted by the Swiss Confederation June 9, 1882; proclaimed July 26, 1882. (Treaties and Conventions, 1889, p. 1150.)

U. S. Treaties 1904, p. 815; 22 Stats. at Large, 940.

(The President's ratification of the act of accession, as transmitted to Berne and exchanged for the ratifications of the other signatory and adhesory powers, embraces the French text of the convention of August 22, 1864, and the additional articles of October 20, 1868. The French text is, therefore, for all international purposes, the standard one. The text printed in the treaty volumes is from the proclamation of the President.

The adhesion of the following states has been communicated: Sweden and Norway, December 13, 1864; Greece, January 5-17, 1865; Great Britain, February 18, 1865; Mecklenburg-Schwerin, March 9, 1865; Turkey, July 5, 1865; Württemberg, June 2, 1866; Hesse, June 22, 1866; Bavaria, June 30, 1866; Austria, July 21, 1866; Portugal, August 9, 1866; Saxony, October 25, 1866; Russia, May 10-22, 1867; Persia, December 5, 1874; Roumania, November 18-30, 1874; Salvador, December 30, 1874; Montenegro, November

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17-29, 1875; Servia, March 24, 1876; Bolivia, October 16, 1879; Chile, November 15, 1879; Argentine Republic, November 25, 1879; Peru, April 22, 1880; Bulgaria, May 27, 1884; Japan, June 11, 1886; Kongo Free State, January 25, 1889; Venezuela, August 2, 1894; Uruguay, June 20, 1900; Korea, January 8, 1903; Guatemala, April 13, 1903.)

ARTICLES.

I. Neutrality of ambulances and hospitals.
II. Neutrality of hospital employees.
III. Extent of neutrality.
IV. Equipment.
V. Neutrality of persons caring for the wounded.
VI. Care of sick and wounded; evacuations.
VII. Flag and arm-badge.
VIII. Regulation of details of execution.
IX. Accession of other countries.
X. Ratification.

1868.

(In the proclamation of the foregoing convention concluded October 20, 1868, the President inserted the certain additional articles, the ratification of which had not been exchanged by the signatory parties. Although not in force as a treaty, they are printed in the treaty volume, as the Senate advised and consented to their ratification at the same time with the convention of August 22, 1864.)

U. S. Treaties 1904, p. 818.

1875.

INTERNATIONAL BUREAU OF WEIGHTS AND MEASURES.

Concluded at Paris May 20, 1875; ratification advised by the Senate May 15, 1878; ratified by the President May 28, 1878; ratifications exchanged August 2, 1878; proclaimed September 27, 1878. (Treaties and Conventions, 1889, p. 1157.)

U. S. Treaties 1904, p. 823; 20 Stats. at Large, 709.

(The treaty submitted to the Senate and attached to the proclamation is in the French language.)

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ARTICLES.

I. International Bureau of Weights and Measures established.
II. Special building.
III. International committee.
IV. General conferences.
V. Regulations.
VI. Duties of the bureau.
VII. Bureau officials.
VIII. Prototypes of meter and kilogram.
IX. Expenses.
X. Contributions.
XI. Contributions from acceding countries.
XII. Future modifications.
XIII. Duration.
XIV. Ratification.

1883.

CONVENTION FOR INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTY.

Concluded at Paris March 20, 1883; adhesion advised by the Senate March 2, 1887; ratified by the President March 29, 1887; accession announced to Swiss Confederation May 30, 1887; proclaimed June 11, 1887. (Treaties and Conventions, 1889, p. 1168.)

U. S. Treaties 1904, p. 834; 25 Stats. at Large, 1372.

(The original Convention is in the French language.)

ARTICLES.

I. Union for protection of industrial property formed.
II. Mutual protection of patents, trademarks, and commercial names.
III. Protection of alien residents.
IV. Protection to applicants.
V. Introduction by patentee of articles patented in other countries.
VI. Deposit of trademarks.
VII. Articles protected.
VIII. Commercial names protected.
IX. Seizure of unlawfully marked goods.
X. Articles with false place of origin.
XI. Temporary protection to articles at expositions.
XII. Central depot of information.
XIII. International bureau established.
XIV. International conferences.
XV. Special diplomatic conventions.
XVI. Adhesion of other states.
XVII. Laws to be enacted.
XVIII. Duration.
XIX. Ratification.
Protocol.

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1891.

SUPPLEMENTARY CONVENTION.

Concluded at Madrid April 15, 1891; ratification advised by the Senate March 2, 1892; ratified by the President March 30, 1892; ratifications exchanged June 15, 1892; proclaimed June 22, 1892.

U. S. Treaties 1904, p. 842; 27 Stats. at Large, 958.

ARTICLES.

I. Expenses of International Bureau.
II. Ratification; duration.

1900.

ADDITIONAL ACT CONCLUDED AT BRUSSELS FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

Concluded December 14, 1900; ratification advised by Senate March 7, 1901; ratified by President April 16, 1901; ratifications deposited at Brussels May 3, 1901; proclaimed August 25, 1902.

U. S. Treaties 1904, p. 843; 32 Stats. at Large, 1930.

ARTICLES.

I. Modification of convention March 20, 1883.
II. Addition to final protocol.
III. Duration; ratification.

1884.

CONVENTION FOR PROTECTION OF SUBMARINE CABLES.

Concluded March 14, 1884; ratification advised by the Senate June 12, 1884; ratified by the President January 26, 1885; ratifications exchanged April 16, 1885; proclaimed May 22, 1885. (Treaties and Conventions, 1889, p. 1176.)

U. S. Treaties 1904, p. 848; 24 Stats. at Large, 989.

(The original is in the French language.)

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ARTICLES.

I. Application of convention.
II. Punishment for injuries to cables.
III. Requirements for cable laying.
IV. Payment for repairs.
V. Rules for ships laying cables.
VI. Vessels to avoid cables.
VII. Losses from cables.
VIII. Jurisdiction of courts.
IX. Prosecution for infractions.
X. Evidence of violations.
XI. Trials.
XII. Laws to be enacted.
XIII. Communication of legislation.
XIV. Adhesion of other states.
XV. Belligerent action not affected.
XVI. Operation; duration.
XVII. Ratification.
Additional article. British colonies.

1886.

DECLARATION RESPECTING THE INTERPRETATION OF ARTICLES II AND IV OF THE CONVENTION OF MARCH 14, 1884, FOR THE PROTECTION OF SUBMARINE CABLES.

Signed at Paris December 1, 1886; ratification advised by the Senate February 20, 1888; ratified by the President March 1, 1888; proclaimed May 1, 1888. (Treaties and Conventions, 1889, p. 1184.)

U. S. Treaties 1904, p. 855; 25 Stats. at Large, 1425.

1887.

FINAL PROTOCOL OF AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS FIXING MAY 1ST, 1888, AS THE DATE OF EFFECT OF THE CONVENTION CONCLUDED AT PARIS MARCH 14, 1884, FOR THE PROTECTION OF SUBMARINE CABLES.

Signed at Paris July 7, 1887; ratification advised by the Senate February 20, 1888; ratified by the President March 1, 1888; proclaimed May 1, 1888. (Treaties and Conventions, 1889, p. 1184.)

U. S. Treaties 1904, p. 856; 25 Stats. at Large, 1425.

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1886.

CONVENTION FOR INTERNATIONAL EXCHANGE OF OFFICIAL DOCUMENTS, SCIENTIFIC AND LITERARY PUBLICATIONS.

Concluded at Brussels March 15, 1886; ratification advised by the Senate June 18, 1888; ratified by the President July 19, 1888; ratifications exchanged January 14, 1889; proclaimed January 15, 1889.

U. S. Treaties 1904, p. 857; 25 Stats. at Large, 1465.

(The text in the treaty volume published by the Government is reprinted from the translation made in the Department of State and proclaimed by the President with the original treaty, which is in the French language.)

ARTICLES.

I. Bureaus of exchanges to be established.
II. Publications to be exchanged.
III. Lists to be printed.
IV. Number of copies.
V. Transmission of documents.
VI. Expense of transmittal.
VII. Publications of learned associations.
VIII. Application of convention.
IX. Adhesion of other states.
X. Ratifications; duration.

1886.

CONVENTION FOR THE IMMEDIATE EXCHANGE OF OFFICIAL JOURNALS, PARLIAMENTARY ANNALS, AND DOCUMENTS.

Concluded at Brussels March 15, 1886; ratification advised by the Senate June 18, 1888; ratified by the President July 19, 1888; ratifications exchanged January 14, 1889; proclaimed January 15, 1889.

U. S. Treaties 1904, p. 859; 25 Stats. at Large, 1469.

ARTICLES.

I. Immediate exchange of official journals, parliamentary annals, documents.
II. Adhesion of other states.
III. Ratification; duration.

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1890.

General Act for the Repression of African Slave Trade.

Signed July 2, 1890; ratification advised by the Senate January 11, 1892; ratified by the President January 19, 1892; ratifications deposited with Belgian Government February 2, 1892; proclaimed April 2, 1892.

U. S. Treaties 1904, p. 861; 27 Stats. at Large, 886.

(The original of this treaty is in the French language and the text given in the volumes published by the Government is from the translation submitted to the Senate and attached to the proclamation.)

ARTICLES.

Chapter I.—*Slave-trade countries.—Measures to be taken in the places of origin.*

I. Measures to counteract slave trade.
II. Duties of stations, cruisers and posts.
III. Support of powers.
IV. National associations.
V. Legislation to be enacted.
VI. Return of liberated slaves.
VII. Protection of fugitive slaves.
VIII. Importation of firearms prohibited.
IX. Regulations for use of firearms.
X. Transit of arms and ammunition.
XI. Information to be furnished.
XII. Legislation to punish offenders.
XIII. Prevention of introduction of firearms.
XIV. Duration of firearms provisions.

Chapter II.—*Caravan routes and transportation of slaves by land.*

XV. Stoppage of convoys.
XVI. Posts on caravan routes.
XVII. Prevention of sales, etc.
XVIII. Care of liberated slaves.
XIX. Punishments.

Chapter III.—*Repression of slave trade by sea.*

Section I.—General provisions.

XX. Agreement of powers.
XXI. Maritime zone.
XXII. Right of search, etc.
XXIII. Vessels liable to search, etc.
XXIV. Effect of present conventions.
XXV. Unlawful use of flag.
XXVI. Exchange of information.
XXVII. International Bureau at Zanzibar.
XXVIII. Slaves escaping to ships of war.
XXIX. Release of slaves on native vessels.

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Section II.—Regulations concerning the use of the flags and supervision by cruisers.

1. *Rules for granting the flag to native vessels, and as to crew lists and manifests of black passengers on board.*

XXX. Control over native vessels.
XXXI. Definition of native vessels.
XXXII. Native vessels which may carry flag.
XXXIII. Renewal of authority.
XXXIV. Act of authority.
XXXV. Crew lists.
XXXVI. Carriage of negro passengers.
XXXVII. Entry of vessels.
XXXVIII. Negro passengers not allowed on native vessels.
XXXIX. Vessels excepted.
XL. Forfeiture of license.
XLI. Forms to be issued.

2.—*The stopping of suspected vessels.*

XLII. Examination of papers.
XLIII. Boarding.
XLIV. Papers to be examined.
XLV. Examination of cargo.
XLVI. Minute of boarding officer.
XLVII. Report of detentions.
XLVIII. Communication to International Bureau.
XLIX. Disposal of seized vessels.

3.—*Of the examination and trial of vessels seized.*

L. Trials.
LI. Disposal of arrested vessels.
LII. Result of condemnation.
LIII. Indemnity for illegal arrests.
LIV. Arbitration of disputed decisions.
LV. Choice of arbitrators.
LVI. Trials.
LVII. Summary proceedings.
LVIII. Release of innocent vessels; damages.
LIX. Penalties.
LX. Special tribunals.
LXI. Communication of instructions.

CHAPTER IV.—*Countries to which slaves are sent, whose institutions recognise the existence of domestic slavery.*

LXII. Prohibition of slave trade.
LXIII. Disposition of liberated slaves.
LXIV. Freedom of fugitive slaves.
LXV. Sales declared void.
LXVI. Examination of native vessels.
LXVII. Penal punishments.
LXVIII. Turkish law.
LXIX. Assistance by Shah of Persia.
LXX. Assistance by Sultan of Zanzibar.
LXXI. Assistance of diplomatic and consular officers.
LXXII. Liberation office.
LXXIII. Exchange of statistics.

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CHAPTER V.—*Institutions intended to insure the execution of the general act.*

Section I.—Of the international maritime office.

LXXIV. International office at Zanzibar.
LXXV. Organization.
LXXVI. Expenses.
LXXVII. Objects.
LXXVIII. Archives; translations.
LXIX. Branch offices.
LXXX. Annual reports.

Section II.—Of the exchange between the Governments of documents and information relative to the slave trade.

LXXXI. Exchange of information.
LXXXII. Central exchange office.
LXXXIII. Reports from Zanzibar office.
LXXXIV. Publications.
LXXXV. Expenses.

Section III.—Of the protection of liberated slaves.

LXXXVI. Offices for liberating slaves.
LXXXVII. Registry of releases.
LXXXVIII. Refuge for women and children.
LXXXIX. Protection of freed slaves.

CHAPTER VI.—*Measures to restrict the traffic in spirituous liquors.*

XC. Prohibited zone.
XCI. Prohibition of importation and manufacture.
XCII. Import duty in certain localities.
XCIII. Excise duty.
XCIV. Prevention of introduction of liquors.
XCV. Information to be communicated.

CHAPTER VII.—*Final provisions.*

XCVI. Contrary stipulations repealed.
XCVII. Modifications.
XCVIII. Adhesion of powers.
XCIX. Ratification.
C. Duration.
Protocol.

1899.

ADHESION OF THE UNITED STATES TO THE CONVENTION SIGNED AT BRUSSELS, JUNE 8, 1889, BY THE PLENIPOTENTIARIES OF CERTAIN POWERS FOR THE REGULATION OF THE IMPORTATION OF SPIRITUOUS LIQUORS INTO CERTAIN REGIONS OF AFRICA.

Concluded June 8, 1899; adhesion advised by Senate December 14, 1900; declaration of adhesion by President February 1, 1901; proclaimed February 6, 1901.

U. S. Treaties 1904, p. 888; 31 Stats. at Large, 1915.

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ARTICLES.

I. Import duty.
II. Excise duty.
III. Adhesion of powers.
IV. Ratification.
V. Effect.

1890.

CONVENTION CONCERNING THE FORMATION OF AN INTERNATIONAL UNION FOR THE PUBLICATION OF CUSTOMS TARIFFS.

Signed at Brussels July 5, 1890; ratification advised by the Senate December 13, 1890; ratified by the President December 17, 1890; proclaimed December 17, 1890.

U. S. Treaties 1904, p. 891; 26 Stats. at Large, 1518.

ARTICLES.

I. International Union formed.
II. Object.
III. International Bureau.
IV. Bulletin to be published.
V. Personnel of Bureau.
VI. Language to be used.
VII. Annual reports.
VIII. Expenditures.
IX. Quotas of contracting states.
X. Reduction to certain countries.
XI. Assignment of quotas.
XII. Official publications to be furnished Bureau.
XIII. Regulations to be established.
XIV. Accession of other states.
XV. Duration, additions. Regulations. Final declarations.

1901

FINAL PROTOCOL ENTERED INTO BETWEEN THE PLENIPOTENTIARIES OF VARIOUS POWERS AT THE CONCLUSION OF THE SO-CALLED "BOXER" TROUBLES IN 1900

Concluded at Peking, September 7, 1901. (Appendix, For. Rel. U. S, 1901.)

U. S. Treaties 1904, p. 900.

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ARTICLES.

I. (a) Assassination of German Minister.
(b) Erection of monument.
II. (a) Punishment.
(b) Suspension of official examinations.
III. Assassination of Japanese chancellor.
IV. Erection of monuments.
V. Importation of arms, etc.
VI. Indemnity; payment.
VII. Legation quarter.
VIII. Razing of forts.
IX. Points occupied.
X. Publication of imperial edicts.
XI. Amendments to commercial treaties; improvement of rivers.
XII. Office of Foreign Affairs; evacuation of Peking, etc.

HAGUE CONVENTIONS.

1899.

CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES.

Concluded July 29, 1899; ratification advised by Senate February 5, 1900; ratified by President April 7, 1900; ratifications deposited with the Netherlands Government September 4, 1900; proclaimed November 1, 1901.

U. S. Treaties 1904, p. 907; 32 Stats. at Large, 1779.

ARTICLES.

Title I. Maintenance of general peace.

I. Pacific settlement of international differences.

Title II. Mediation.

II. Good offices.
III. Offer of mediation.
IV. Mediator.
V. Termination of mediator's duties.
VI. Effect of mediation.
VII. Acceptance of mediation.
VIII. Special mediation; choosing mediators, etc.

Title III. International commissions of inquiry.

IX. Investigations by commission.
X. Special agreement; jurisdiction.
XI. Formation.
XII. Facilities supplied commission.
XIII. Report.
XIV. Effect of report.

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Title IV. International arbitration.

Chapter I. System of arbitration.

XV. Object.
XVI. Recognition.
XVII. Questions considered.
XVIII. Submission to award.
XIX. Extension of arbitration.

Chapter II. Permanent court of arbitration.

XX. Organization.
XXI. Jurisdiction.
XXII. International bureau.
XXIII. Arbitrators.
XXIV. Selection of arbitrators; assembling of tribunal.
XXV. Seat of tribunal.
XXVI. Special board of arbitration; extension of jurisdiction.
XXVII. Notice to disputants.
XXVIII. Administrative council.
XXIX. Expenses of bureau.

Chapter III. Arbitral procedure.

XXX. Rules.
XXXI. Special act.
XXXII. Selection of arbitrators.
XXXIII. Sovereign as arbitrator.
XXXIV. Umpire.
XXXV. Vacancies.
XXXVI. Place of session.
XXXVII. Agents, counsel, etc.
XXXVIII. Language.
XXXIX. Procedure.
XL. Exchange of documents.
XLI. Discussions.
XLII. Limiting discussions.
XLIII. New evidence.
XLIV. Production of acts.
XLV. Oral arguments.
LXVI. Rulings.
XLVII. Questions by tribunal.
XLVIII. Interpretation.
XLIX. Rules of procedure.
L. Closing discussion.
LI. Deliberation.
LII. Award.
LIII. Announcing award.
LIV. Effect of award.
LV. Revision of award.
LVI. Parties bound by award.
LVII. Expenses of tribunal.
LVIII. Ratification.
LIX. Adhesion by powers non-signatory.
LX. Adhesion by powers not represented.
LXI. Denunciation.

1899.

Declaration as to Launching of Projectiles and Explosives.

Concluded July 29, 1899; ratification advised by Senate February 5, 1900; ratified by President April 7, 1900; ratifications deposited with Netherlands Government September 4, 1900; proclaimed November 1, 1901.

U. S. Treaties 1904, p. 922; 32 Stats. at Large, 1839.

This declaration expired July 29, 1904.

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1899.

CONVENTION FOR THE ADAPTATION TO MARITIME WARFARE OF THE PRINCIPLES OF THE GENEVA CONVENTION OF AUGUST 22, 1864.

Concluded July 29, 1899; ratification advised by Senate May 4, 1900; ratified by the President August 3, 1900; ratifications deposited with the Netherlands Government September 4, 1900; proclaimed November 1, 1901.

U. S. Treaties 1904, p. 924; 32 Stats. at Large, 1827.

ARTICLES.

I. Military hospital ships.
II. Private hospital ships.
III. Hospital ships of neutral countries.
IV. Use of hospital ships.
V. Color; flag.
VI. Neutral vessels.
VII. Relief staffs.
VIII. Disabled prisoners.
IX. Prisoners of war.
X. Excluded.
XI. Powers bound by rules.
XII. Ratification.
XIII. Nonsignatory powers.
XIV. Denunciation.

1899.

CONVENTION WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND.

Concluded July 29, 1899; ratification advised by the Senate March 14, 1902; ratified by the President March 19, 1902; ratifications deposited with the Netherlands Government April 5, 1902; proclaimed April 11, 1902.

U. S. Treaties 1904, p. 931; 32 Stats. at Large, 1803.

ARTICLES.

I. Instructions to forces.
II. When binding.
III. Ratification.
IV. Nonsignatory powers.
V. Renunciation.

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Section I.—Belligerents.

Chapter I.—Qualifications of belligerents.

I. Application of laws of war.
II. Unorganized belligerents.
III. Combatants; noncombatants.

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Chapter II.—Prisoners of war.

IV. Treatment.
V. Confinement.
VI. Employment.
VII. Maintenance.
VIII. Laws; regulations; recapture.
IX. False statements.
X. Parole.
XI. Parole voluntary.
XII. Recapture after parole.
XIII. Reporters, sutlers, etc.
XIV. Bureau of information.
XV. Relief society.
XVI. Postage; gifts.
XVII. Officers' pay.
XVIII. Religious freedom.
XIX. Wills.
XX. Repatriation.

Chapter III.—Sick and wounded.

XXI. Obligations of belligerents.

Section II.—Hostilities.

Chapter I.—Means of injuring enemy; sieges; bombardments.

XXII. Means of injuring enemy.
XXIII. Prohibitions.
XXIV. Obtaining information.
XXV. Attack of towns, etc.
XXVI. Warning authorities.
XXVII. Religious edifices, etc.
XXVIII. Pillage.

Chapter II.—Spies.

XXIX. Who considered spies.
XXX. Trial.
XXXI. Responsibility for previous acts.

Chapter III.—Flags of truce.

XXXII. Bearer.
XXXIII. Receiving flag.
XXXIV. Treachery.

Chapter IV.—Capitulation.

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XXXVII. General and local.
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XXXIX. Terms.
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Section III.—Military authority over hostile territory.

XLII. Territory; occupation.
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XLIV. Forced military service.
XLV. Oath.
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XLVII. Pillage.
XLVIII. Taxes, dues, etc.
XLIX. Taxes for military necessities.
L. Penalty.
LI. Collection of taxes.
LII. Requisition and services.
LIII. Seizure of public cash, etc.; railways, etc.
LIV. Plant of railways.
LV. Administration.
LVI. Religious, etc., institution.

Section IV.—Internment of belligerents and care of wounded in neutral countries.

XVII. Internment in neutral state.
LVIII. Treatment.
LIX. Transit.
LX. Geneva convention.

1905.

Treaty Between the United States and Certain Powers for the Arbitration of Pecuniary Claims.

Signed at Mexico January 30, 1902; ratification advised by the Senate January 11, 1905; ratified by the President of the United States January 28, 1905; ratifications deposited with the Mexican Government February 10, 1905; proclaimed March 24, 1905.

Treaties and Proclamations, 2845; 34 Stats. at Large, pt. 3.

ARTICLES.

I. Pecuniary claims to be arbitrated.
II. Permanent court of arbitration to decide.
III. States affected.
IV. Special treaty provisions.
V. Effect and duration.

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APPENDIX IV.

CHRONOLOGICAL LIST OF TREATIES, CONVENTIONS, ETC.

Country.	Subject.	Signed.	Proclaimed.
France	Alliance	February 6, 1778.	May 4, 1778.a
France	Separate and secret article	February 6, 1778.	May 4, 1778.a
France	Amity and Commerce	February 6, 1778.	May 4, 1778.a
France	Contract for the Repayment of Loans made by the King of France	July 16, 1782	January 22, 1788.a
Netherlands	Peace and Commerce	October 8, 1782	January 22, 1783.
Netherlands	Recaptured vessels	October 8, 1782	January 23, 1783.
Great Britain	Provisional Peace	November 30, 1782	April 11, 1783.
Great Britain	Armistice, cessation of hostilities	January 20, 1783.	
France	Contract for a New Loan and the Repayment of the Old Loans made by the King of France	February 25, 1783.	October 31, 1783.a
Sweden	Amity and Commerce	April 3, 1783	September 25, 1783.
Great Britain	Definitive Peace	September 3, 1783.	January 14, 1784.
Prussia	Amity and Commerce	September 10, 1785	October, 1786.b
Morocco	Peace and Friendship	January, 1787	July 18, 1787.a
France	Consular	November 14, 1788	
Great Britain	Amity, Commerce, and Navigation	November 19, 1794	February 29, 1796.
Algiers	Peace and Amity	September 5, 1795.	March 2, 1796.c
Spain	Friendship, Boundaries, Commerce and Navigation	October 27, 1795.	August 2, 1796.
Great Britain	Explanatory to Article III. Treaty of 1794	May 4, 1796	May 9, 1796.c
Tripoli	Peace and Friendship	November 4, 1796.	June 10, 1797.
Tunis	Amity, Commerce, and Navigation	August, 1797	December 24, 1799.c
Great Britain	Explanatory to Article V, Treaty of 1794	March 15, 1798	June 5, 1798.c
Prussia	Amity and Commerce	July 11, 1799	November 4, 1800.
France	Peace, Commerce, and Navigation	September 30, 1800	December 21, 1801.
Great Britain	Payment of Indemnities and Settlement of Debts	January 8, 1802	April 27, 1802.
Spain	Claims	August 11, 1802	December 22, 1818.
France	Cession of Louisiana	April 30, 1803	October 21, 1803.
France	Payment for the Purchase of Louisiana	April 30, 1803	October 21, 1803.
France	Claims	April 30, 1803	October 21, 1803.
Tripoli	Peace and Amity	June 4, 1805	April 12, 1806.c
Great Britain	Peace and Amity	December 24, 1814.	February 18, 1815.
Algiers	Amity and Peace	June 30, 1815	December 26, 1815.
Great Britain	Commerce and Navigation	July 3, 1815	December 22, 1815.
Sweden and Norway	Amity and Commerce	September 4, 1816.	December 31, 1818.
Algiers	Peace and Amity	December 22, 23, 1816	February 11, 1822.

a Ratified by Congress. b Ratifications exchanged.

c Ratification advised by the Senate.

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Country.	Subject.	Signed.	Proclaimed.
Great Britain...	Naval Forces on the Great Lakes	April, 1817.....	April 28, 1818.
Great Britain...	Respecting Fisheries, Boundary, and the Restoration of Slaves	October 20, 1818..	January 30, 1819.
Spain	Friendship, Cession of the Floridas, and Boundaries..	February 22, 1819.	February 22, 1821.
France	Navigation and Commerce....	June 24, 1822....	February 12, 1823.
Great Britain...	Claims	July 12, 1822....	January 11, 1823.
Tunis	Amending Treaty of August, 1797	February 24, 1824.	January 21, 1825.
Russia	Pacific Ocean and Northwest Coast of America.....	April 17, 1824....	January 12, 1825.
Colombia	Amity, Commerce, and Navigation	October 3, 1824..	May 31, 1825.
Central America.	Peace, Amity, Commerce, and Navigation	December 5, 1825.	October 28, 1826.
Denmark	Friendship, Commerce and Navigation	April 26, 1826....	October 14, 1826.
Great Britain...	Relative to the Indemnity for Slaves	November 13, 1826	March 19, 1827.
Sweden and Norway	Commerce and Navigation.....	July 4, 1827.....	January 19, 1828.
Great Britain...	Continuing in Force Article III, Treaty of 1818.....	August 6, 1827...	May 15, 1828.
Great Britain...	Commercial	August 6, 1827...	May 15, 1828.
Great Britain...	Relative to the Northeastern Boundary	September 29, 1827	May 15, 1828.
Hanseatic Republics	Friendship, Commerce, and Navigation	December 20, 1827	June 2, 1828.
Mexico	Limits	January 12, 1828..	April 5, 1832.
Prussia	Commerce and Navigation.....	May 1, 1828.....	March 14, 1829.
Hanseatic Republics	Additional Article to Convention of 1827	June 4, 1828.....	July 29, 1829.
Brazil	Amity, Commerce, and Navigation	December 12, 1828	March 18, 1829.
Austria-Hungary.	Commerce and Navigation.....	August 27, 1829..	February 10, 1831.
Denmark	Claims	March 28, 1830...	June 5, 1830.
Ottoman Empire.	Commerce and Navigation.....	May 7, 1830.....	February 4, 1832.
Mexico	Limits	April 5, 1831.....	April 5, 1832.
Mexico	Amity, Commerce, and Navigation	April 5, 1831.....	April 5, 1832.
France	Claims and Duties on Wines and Cotton.....	July 4, 1831.....	July 13, 1832.
Chile	Peace, Amity, Commerce, and Navigation	May 16, 1832....	April 29, 1834.
Two Sicilies....	Claims	October 14, 1832..	August 27, 1833.
Russia	Commerce and Navigation.....	December 18, 1832	May 11, 1833.
Siam	Amity and Commerce.....	March 20, 1833...	June 24, 1837.
Chile	Additional to the General Treaty of 1832.....	September 1, 1833.	April 29, 1834.
Muscat	Amity and Commerce.....	September 21, 1833	June 24, 1837.
Spain	Claims	February 17, 1834.	November 1, 1834.
Mexico	Limits	April 3, 1835.....	April 21, 1836.
Venezuela	Peace, Amity, Commerce, and Navigation	January 20, 1836..	June 30, 1836.
Morocco	Peace and Friendship.....	September 16, 1836	January 30, 1837.
Peru-Bolivia ...	Peace, Friendship, Commerce, and Navigation.....	November 30, 1836	October 8, 1838.
Greece	Commerce and Navigation.....	December 10, 1837	August 30, 1838.
Texas	Claims	April 11, 1838....	July 6, 1838.
Texas	Boundary	April 25, 1838....	October 13, 1838.
Sardinia	Commerce and Navigation.....	November 26, 1838	March 18, 1839.
Netherlands	Commerce and Navigation.....	January 19, 1839..	May 24, 1839.
Mexico	Claims	April 11, 1839....	April 8, 1840.
Ecuador	Peace, Friendship, Navigation, and Commerce.....	June 13, 1839....	September 23, 1842.
Hanover	Commerce and Navigation.....	May 20, 1840.....	January 2, 1841.
Portugal	Commerce and Navigation.....	August 26, 1840..	April 24, 1841.
Peru	Claims	March 17, 1841...	January 8, 1847.
Great Britain...	Boundaries, Suppression of Slave Trade, and Extradition	August 9, 1842...	November 10, 1842.
Mexico	Claims	January 30, 1843..	March 30, 1843.
France	Extradition	November 9, 1843.	April 14, 1844.
Hesse	Abolishing Droit d'Aubaine and Taxes on Emigration.....	March 26, 1844...	May 8, 1845.

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Country.	Subject.	Signed.	Proclaimed.
Württemberg....	Abolishing Droit d'Aubaine and Taxes on Emigration.....	April 10, 1844....	December 16, 1844.
China	Peace, Amity, and Commerce..	July 3, 1844.....	April 18, 1846.
Bavaria	Abolishing Droit d'Aubaine and Taxes on Emigration.....	January 21, 1845.	August 15, 1846.
France	Extradition, additional article.	February 24, 1845.	July 24, 1845.
Belgium	Commerce and Navigation.....	November 10, 1845	March 31, 1846.
Saxony	Abolishing Droit d'Aubaine and Emigration Taxes.....	May 14, 1845.....	September 9, 1846.
Nassau	Abolishing Droit d'Aubaine and Emigration Taxes.....	May 27, 1845.....	January 26, 1847.
Hanover	Commerce and Navigation.....	June 10, 1846....	April 24, 1847.
Great Britain...	Establishing Boundary West of the Rocky Mountains.....	June 15, 1846....	August 5, 1846.
Two Sicilies ...	Commerce and Navigation.....	December 1, 1845.	July 24, 1846.
Colombia (New Granada)	Peace, Amity, Navigation, and Commerce	December 12, 1846	June 12, 1848.
Switzerland	Property Rights.....	May 18, 1847....	May 4, 1848.
Mecklenburg-Schwerin.....	Commerce and Navigation.....	December 9, 1847.	August 2, 1848.
Mexico	Peace, Friendship, Limits, and Settlement	February 2, 1848..	July 4, 1848.
Austria-Hungary.	Relative to the Disposal of Property and Consular Jurisdiction	May 8, 1848.....	February 25, 1850.
Brazil	Satisfaction of Claims of Citizens of the United States on Brazil	January 27, 1849..	January 19, 1850.
Guatemala	Peace, Friendship, Commerce, and Navigation	March 3, 1849....	July 28, 1852.
Hawaiian Islands.	Friendship, Commerce and Navigation, and Extradition.	December 20, 1849	November 9, 1850.
Salvador	Amity, Navigation and Commerce	January 2, 1850..	April 18, 1853.
Great Britain ...	Ship-canal Connecting Atlantic and Pacific Oceans.....	April 19, 1850....	July 5, 1850.
Colombia (New Granada)	Consular	May 4, 1850.....	December 5, 1851.
Borneo	Amity, Commerce and Navigation	June 23, 1850....	July 12, 1854.
Switzerland	Friendship, Commerce, and Navigation	November 25, 1850	November 9, 1855.
Great Britain...	Protocol, Horseshoe Reef.....	December 9, 1850.	
Portugal	Claims	February 26, 1851	September 1, 1851.
Costa Rica.....	Friendship, Commerce, and Navigation	June 10, 1851....	May 26, 1852.
Peru	Friendship, Commerce, and Navigation	July 26, 1851....	July 19, 1852.
Hanseatic Republics	Consular	April 30, 1852....	June 6, 1853.
Prussia	Extradition	June 16, 1852....	June 1, 1853.
Netherlands	Commerce and Navigation.....	August 26, 1852..	February 26, 1853.
Great Britain ...	Claims	February 8, 1853.	August 20, 1853.
France	Consular	February 23, 1853	August 12, 1853.
Argentine Republic	Free Navigation of the Rivers Parana and Uruguay.....	July 10, 1853.....	April 9, 1855.
Argentine Republic	Friendship, Commerce, and Navigation	July 27, 1853.....	April 9, 1855.
Bavaria	Extradition	September 12, 1853	November 18, 1854.
Mexico	Boundary, Cession of Territory, Transit of Isthmus of Tehuantepec, etc.....	December 30, 1853	June 30, 1854.
Japan	Peace, Amity, and Commerce..	March 31, 1854...	June 22, 1855.
Great Britain...	Reciprocity as to Fisheries, Duties, and Navigation, British North American Colonies...	June 5, 1854.....	September 11, 1854.
Loo Choo.....	Friendship and Commerce.....	July 11, 1854.....	March 9, 1855.
Great Britain...	Claims	July 17, 1854.....	September 11, 1854.
Russia	Rights of Neutrals at Sea.....	July 22, 1854.....	November 1, 1854.
Brunswick and Lüneburg.....	Respecting the Disposition of Property	August 21, 1854..	July 30, 1855.
Two Sicilies....	Rights of Neutrals at Sea....	January 13, 1855.	July 16, 1855.
Hanover	Extradition	January 18, 1855.	May 5, 1855.
Netherlands	Consular	January 22, 1855.	May 26, 1855.
Two Sicilies....	Amity, Commerce and Navigation, and Extradition.....	October 1, 1855...	December 10, 1856.
Siam	Amity and Commerce	May 29, 1856.....	August 16, 1858.

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Country.	Subject.	Signed.	Proclaimed.
Peru	Rights of Neutrals at Sea	July 22, 1856	November 2, 1857.
Persia	Friendship and Commerce	December 13, 1856	August 18, 1857.
Austria-Hungary.	Extradition	July 3, 1856	December 15, 1858
Baden	Extradition	January 30, 1857	May 19, 1857.
Denmark	Discontinuing the Sound Dues.	April 11, 1857	January 13, 1858.
Japan	Commercial and Consular	June 17, 1857	June 30, 1858.
Peru	Interpreting Article XII, Treaty of 1851	July 4, 1857	October 14, 1858.
Colombia (New Granada)	Claims	September 10, 1857	November 8, 1860.
Bolivia	Peace, Friendship, Commerce and Navigation	May 13, 1858	January 8, 1863.
China	Peace, Amity, and Commerce	June 18, 1858	January 26, 1860.
Belgium	Commerce and Navigation	July 17, 1858	April 19, 1859.
Japan	Commerce and Navigation	July 29, 1858	May 23, 1860.
China	Establishing Trade Regulations and Tariff	November 8, 1858.	
China	Claims	November 8, 1858.	
Chile	Arbitration of Macedonian Claims	November 10, 1858	December 22, 1859.
France	Extradition, additional article.	February 10, 1858.	February 14, 1859.
Venezuela	Claims	January 14, 1859.	February 26, 1861[a]
Paraguay	Claims	February 4, 1859	March 12, 1860.
Paraguay	Friendship, Commerce, and Navigation	February 4, 1859	March 12, 1860.
Sweden and Norway	Extradition	March 21, 1860	December 21, 1860.
Costa Rica	Claims	July 2, 1860	November 11, 1861.
Venezuela	Amity, Commerce and Navigation, and Extradition	August 27, 1860	September 25, 1861.
Denmark	Consular	July 11, 1861	September 20, 1861.
Hanover	Abolishing Stade or Brunshausen Dues	November 6, 1861.	June 17, 1862.
Mexico	Extradition	December 11, 1861	June 20, 1862.
Great Britain	Suppression of African Slave Trade	April 7, 1862	June 7, 1862.
Ottoman Empire.	Commerce and Navigation	February 25, 1862.	July 2, 1862.
Liberia	Commerce and Navigation	October 21, 1862.	March 18, 1863.
Ecuador	Claims	November 25, 1862	September 8, 1864.
Peru	Claims	December 20, 1862	May 19, 1863.
Peru	Claims	January 12, 1863.	May 19, 1863.
Great Britain	Additional Article Suppression of Slave Trade, 1862	February 17, 1863.	April 22, 1863.
Belgium	Relative to Import Duties and Capitalization of Scheldt Dues	May 20, 1863	November 18, 1864.
Great Britain	Claims	July 1, 1863	March 5, 1864.
Belgium	Extinguishment of the Scheldt Dues	July 20, 1863	November 18, 1864.
Japan	Reduction of Import Duties	January 28. 1864.	April 9, 1866.
Colombia	Claims	February 10, 1864.	August 19, 1865.
Honduras	Friendship, Commerce, and Navigation	July 4, 1864	May 30, 1865.
Japan	Payment of the Simonoseki Indemnities	October 22, 1864	April 9, 1866.
Hayti	Amity, Commerce and Navigation, and Extradition.	November 3, 1864.	July 6, 1865.
Morocco	Cape Spartel Lighthouse	May 31, 1865	March 12, 1867.
Venezuela	Claims	April 25, 1866	May 29, 1867.
Japan	Establishing Tariff Duties	June 25, 1866	
Dominican Republic	Amity, Commerce and Navigation, and Extradition	February 8, 1867	October 24, 1867.
Madagascar	Commerce and Navigation	February 14, 1867.	October 1, 1868.
Russia	Ceding Alaska	March 30, 1867	June 20, 1867.
Nicaragua	Friendship, Commerce, and Navigation, and as to Isthmian Transit	June 21, 1867	August 13, 1868.
Siam	Modification to Treaty of May 29, 1856	December 17-31, 1867	August 11, 1868.[a]
Russia	Additional Article to Treaty of Commerce, 1832. Trademarks	January 27, 1868.	October 15, 1868.
Italy	Consular	February 8, 1868	February 23, 1869.
North German Union	Naturalization	February 22, 1868.	May 27, 1868.
Italy	Extradition	March 23, 1868	September 30, 1868.
Bavaria	Naturalization	May 26, 1868	October 8, 1868.

[a] Ratified by the President.

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Country.	Subject.	Signed.	Proclaimed.
Mexico	Claims	July 4, 1868	February 1, 1869.
China	Trade, Consuls, and Emigration	July 28, 1868	February 5, 1870.
Mexico	Naturalization	July 10, 1868	February 1, 1869.
Baden	Naturalization	July 19, 1868	January 10, 1870.
Württemberg	Naturalization and Extradition	July 27, 1868	March 7, 1870.
Hesse	Naturalization	August 1, 1868	August 31, 1869.
Belgium	Naturalization	November 16, 1868	July 30, 1869.
Peru	Claims	December 4 1868.	July 6, 1869.
Belgium	Consular	December 5. 1868.	March 7, 1870.
Belgium	Trademarks	December 20. 1868	July 30, 1869.
Italy	Consular	January 21, 1869	May 11, 1869.
Italy	Additional to Extradition Convention, 1868	January 21, 1869.	May 11, 1869.
France	Trademarks	April 16, 1869	July 6, 1869.
Sweden and Norway	Naturalization	May 26, 1869	January 12, 1872.
Great Britain	Naturalization	May 13, 1870	September 16, 1870.
Salvador	Extradition	May 23, 1870	March 4, 1874.
Great Britain	Suppression of Slave Trade	June 3, 1870	September 16, 1870.
Nicaragua	Extradition	June 25, 1870	September 19, 1871.
Austria-Hungary	Consular	July 11, 1870	June 29, 1871.
Peru	Friendship, Commerce, and Navigation	September 6, 1870.	July 27, 1874.
Peru	Extradition	September 12, 1870	July 27, 1874.
Austria-Hungary	Naturalization	September 20, 1870	August 21, 1871.
Italy	Commerce and Navigation	February 26, 1871.	November 23, 1871.
Mexico	Claims	April 19, 1871	February 8, 1872.
Great Britain	Settlement of all Causes of Difference	May 8, 1871	July 4, 1871.
German Empire	Consular	December 11, 1871	June 1, 1872.
Orange Free State	Friendship, Commerce, and Navigation	December 22. 1871	August 23, 1873.
Ecuador	Naturalization	May 6, 1872	November 24, 1873.
Ecuador	Extradition	June 28, 1872	December 24, 1873.
Denmark	Naturalization	July 20, 1872	April 25, 1873.
Mexico	Claims	November 27, 1872	July 24, 1873.
Great Britain	Additional Article to Treaty of May 8, 1871, Respecting Meeting Places for the Commission Under Article XII.	January 18, 1873.	April 15, 1873.
Belgium	Extradition	March 19, 1874	May 1, 1874.
Russia	Trademark Declaration	March 28, 1874	November 24, 1874.
Ottoman Empire	Extradition	August 11, 1874	May 26, 1875.
Mexico	Claims	November 20, 1874	January 28, 1875.
Hawaiian Islands	Reciprocity	January 30, 1875.	June 3, 1875.
Belgium	Commerce and Navigation	March 8, 1875	June 29, 1875.
Mexico	Claims	April 29, 1876	June 29, 1876.
Spain	Extradition	January 5, 1877	February 21, 1877.
Great Britain	Declaration Affording Reciprocal Protection to Trademarks	October 24, 1877.	July 17, 1878.
Samoan Islands	Friendship and Commerce	January 17, 1878.	February 13, 1878.
Italy	Consular	May 8, 1878	September 27, 1878.
Netherlands	Consular	May 23, 1878	August 1, 1879.
Japan	Commercial	July 25, 1878	April 8, 1879.
Brazil	Trademarks Agreement	September 24, 1878	June 17, 1879.
France	Claims	January 15. 1880.	June 25, 1880
Belgium	Consular	March 9, 1880	March 1, 1881.
Japan	Reimbursing Shipwreck Expenses	May 17, 1880	October 3, 1881.
Netherlands	Extradition	May 22, 1880	July 30, 1880.
Morocco	Protection	July 3, 1880	December 21, 1881.
China	Immigration	November 17, 1880	October 5, 1881.
China	Commercial Intercourse and Judicial Procedure	November 17, 1880	October 5, 1881.
Italy	Supplemental to Consular Convention, 1878	February 24, 1881.	June 29, 1881.
Madagascar	Friendship and Commerce	May 13, 1881	March 13, 1883.
Roumania	Consular	June 17, 1881	July 9, 1883.
Servia	Commerce and Navigation	October 14 1881.	December 27, 1882.
Servia	Consular	October 14, 1881.	December 27, 1882.
Korea	Peace, Amity, Commerce, and Navigation	May 22, 1882	June 4, 1883.
Italy	Trademark Declaration	June 1, 1882	March 19, 1884.
Belgium	Extradition	June 13, 1882	November 20, 1882.

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Country.	Subject.	Signed.	Proclaimed.
Spain	Trademark	June 19, 1882	April 19, 1883.
France	Claims	July 19, 1882	December 29, 1882.
Mexico	Boundary	July 29, 1882	March 5, 1883.
Spain	Supplementary Extradition	August 7, 1882	April 19, 1883.
Mexico	Commercial Reciprocity	January 20, 1883	June 2, 1884.
France	Claims	February 8, 1883.	June 25, 1883.
Netherlands	Agreement, Registration of Trademarks	February 16, 1883	
Switzerland	Agreement, Trademarks	May 14, 1883	
Luxemburg	Extradition	October 29, 1883.	August 12, 1884.
Belgium	Trademark	April 7, 1884	July 9, 1884.
International Association of Kongo	Recognition of Flag	April 22, 1884	
Siam	Regulating Liquor Traffic in Siam	May 14, 1884	July 5, 1884.
Russia	Declaration, Admeasurement of Vessels	June 6, 1884	
Italy	Additional to Extradition Convention, 1868	June 11, 1884	April 24, 1885.
Mexico	Boundary, Rio Grande and Rio Colorado	November 12, 1884	September 14, 1886.
Egypt	Commercial Agreement	November 16, 1884	May 7, 1885.
Hawaiian Islands.	Reciprocity	December 6, 1884.	November 9, 1887.
Mexico	Reciprocity	February 25, 1885.	May 4, 1886.
Venezuela	Claims	December 5, 1885.	June 4, 1889.
Mexico	Boundary	December 5, 1885.	June 28, 1887.
Denmark	Admeasurement of Vessels	February 26, 1886	
Japan	Extradition	April 29, 1886	November 3, 1886.
Mexico	Reciprocity	May 14, 1886	February 1, 1887.
Zanzibar	Duty on Liquors, and Consular Powers	July 3, 1886	August 17, 1888.
Tonga	Amity, Commerce, and Navigation	October 2, 1886	September 18, 1888.
Russia	Extradition	March 28, 1887	June 5, 1893.
Netherlands	Extradition	June 2, 1887	June 21, 1889.
Peru	Friendship, Commerce, and Navigation	August 31, 1887	November 7, 1888.
Venezuela	To Remove Doubts as to the Meaning of the Convention of 1885	March 15, 1888	June 4, 1889.
Colombia	Extradition	May 7, 1888	February 6, 1891.
Denmark	Submitting Claim of Carlos Butterfield & Co. to Arbitration	December 6, 1888.	May 24, 1889.
Venezuela	Extending the Time for Ratification of the Convention of 1885	October 5, 1888	June 4, 1889.
Mexico	Boundary	February 18, 1889.	October 14, 1889.
Mexico	Boundary	March 1, 1889	December 26, 1890.
Great Britain and Germany	Neutrality and Autonomous Government of the Samoan Islands	June 14, 1889	May 21, 1890.
Great Britain	Extradition	July 12, 1889	March 25, 1890.
Kongo	Amity, Commerce, and Navigation	January 24, 1891.	April 2, 1892.
Venezuela	Claims	January 19, 1892.	July 30, 1894.
Great Britain	Relating to Fur Seals in Bering Sea	February 29, 1892.	May 9, 1892.
Great Britain	Renewal of the Existing Modus Vivendi in Bering Sea	April 18, 1892	May 9, 1892.
Great Britain	Recovery of Deserters from Merchant Vessels	June 3, 1892	August 1, 1892.
Denmark	Trademark	June 15, 1892	October 12, 1892.
Great Britain	Delimiting Boundaries not Permanently Marked	July 22, 1892	August 26, 1892.
Chile	Claims	August 7, 1892	January 28, 1893.
Sweden	Extradition	January 14, 1893	March 18, 1893.
Ecuador	For Arbitration of Claim of Julio R. Santos	February 28, 1893.	November 7, 1894.
Norway	Extradition	June 7, 1893	November 9, 1893.
Great Britain	Extending the Terms of the Alaskan Boundary Commissions	February 8, 1894	March 28, 1894.
China	Regulating Chinese Immigration	March 17, 1894.	December 8, 1894.

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ussia	Modus Vivendi in Relation to the Fur-Seal Fisheries in Bering Sea and the North Pacific Ocean	May 4, 1894.....	May 12, 1894.
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razil	Extradition	May 28, 1898.....	April 30, 1903.
rance	Reciprocity Agreement.....	May 28, 1898.....	May 30, 1898.
lexico	Boundary	December 2, 1898..	February 3, 1899.
pain	Peace	December 10, 1898.	April 11, 1899.
lexico	Extradition	February 22, 1899.	April 24, 1899.
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China	Commercial	October 8, 1903	January 13, 1904.
Panama	Ship Canal	November 18, 1903.	February 26, 1904.
Netherlands	Extradition	January 18, 1904.	May 31, 1904.
France	Relations in Tunis	March 15, 1904	May 9, 1904.
Cuba	Relations with Cuba	May 22, 1903	July 2, 1904.
Cuba	Supplementary	January 20, 1904.	July 2, 1904.
Ethiopia	Commercial Relations	December 27, 1903.	September 30, 1904
Panama	Extradition	May 25, 1904	May 12, 1905.
Hayti	Extradition	August 9, 1904	June 28, 1905.
Norway	Extradition	December 10, 1904	April 6, 1905.
Great Britain	Relinquishing Extraterritorial Rights in Zansibar	February 25, 1904	June 12, 1905.
Denmark	Extradition	November 6, 1905.	February 19, 1906.
Japan	Copyright	November 10, 1905	May 17, 1906.
Roumania	Trademarks	March 18-31, 1906	June 25, 1906.
Great Britain	Extradition	April 12, 1905	February 12, 1907.
Great Britain	Boundary Alaska	April 21, 1906	August 21, 1906.
Japan	Extradition, Supplementary	May 17, 1906	September 26, 1906.
Mexico	Rio Grande Waters	May 21, 1906	January 16, 1907.

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Amelioration of the Condition of the Wounded in Time of War	July 26, 1882.
Protection of Submarine Cables	May 22, 1885.
International Protection of Industrial Property	June 11, 1887.
International Exchange of Official Documents, Scientific and Literary Publications	January 15, 1889.
Immediate Exchange of Official Journals, Parliamentary Annals, and Documents	January 15, 1889.
International Union for the Publication of Customs Tariffs	December 17, 1890.
General Act for the Repression of African Slave Trade	April 2, 1892.
Supplementary Convention as to Expenses of International Bureau for Protection of Industrial Property	June 22, 1892.
Adhesion of United States to Brussels Convention for Regulation of Importation of Spirituous Liquors into Africa	February 6, 1901.
Final Protocol Between China and Other Powers, Fixing Indemnity to be Paid by China on Account of Uprising Against Foreigners in 1900	September 7, 1901.a
Convention for Pacific Settlement of International Disputes, Signed at The Hague July 29, 1899	November 1, 1901.
Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864, Signed at The Hague July 29, 1899	November 1, 1901.
Declaration as to Launching of Projectiles and Explosives, Signed at The Hague July 29, 1899	November 1, 1901.
Convention with Respect to the Laws and Customs of War on Land, Signed at The Hague July 29, 1899	April 11, 1902.
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